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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

MAY 14 — OCTOBER 29, 1912

FREDERIC K. CONOVER
OFFICIAL REPORTER

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1912

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

Attorney General - - LEVI H. BANCROFT

Clerk - - - CLARENCE KELLOGG

ERRATA.

Vol. 143.

Page 242, lines —3, 4. For *F. C. Cady*, read *S. H. Cady*.

Vol. 149.

Page 519, line 28. For the state board, read a stated number.

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IN MEMORIAM.

ROBERT McKEE BASHFORD.

On the 17th day of September, 1912, Mr. John A. Aylward of Madison addressed the court:

May it please the Court:—The committee appointed by the Dane County Bar Association for that purpose, herewith presents to the court a brief memorial of the life and services of the late Justice ROBERT MCKEE BASHFORD, whose death occurred in this city on the 29th day of January, 1911. We pray that the same be made a part of the permanent records of this court.

Memorial of the Dane County Bar Association.

ROBERT MCKEE BASHFORD was born at Fayette, Lafayette county, Wisconsin, on December 31, 1845. His father was Dr. Samuel M. Bashford, a native of New York City, who settled in Grant county, Wisconsin, in 1833. His mother was Mary Ann McKee Bashford, a native of Kentucky.

Mr. BASHFORD'S boyhood days were spent upon the farm, where with his brothers he shared the arduous labors of the pioneer farmer's son. He attended the country schools in winter, and in the fall of 1863 he entered the preparatory department of the Wisconsin State University. He maintained himself at the University by teaching school in winter and doing farm work in summer. In off moments Mr. BASHFORD frequently related with relish tales of the simple dormitory life of those days, when each student was his own housekeeper and chambermaid and often his own cook. Mr. BASHFORD graduated from the University, from the ancient classical course, in June, 1870. He then read law at the office of Smith & Lamb of Madison, then one of the leading law firms of the state. He graduated in law from the University in 1871.

Instead of immediately taking up the practice of law Mr. BASHFORD, with A. C. Parkinson and George Raymer, purchased the Madison Daily and Weekly Democrat. He continued as chief editor and one of the proprietors of this paper for five years. Mr. BASHFORD had a strong, trenchant pen and was courageous in the expression of his convictions. The Democrat under his editorial guidance soon became the leading Democratic newspaper in the state. He strongly urged the nomination of Hon. James R. Doolittle as governor, and

was the secretary of the Democratic state committee during the Doolittle campaign. He was especially active in the campaign of 1873, and was influential in bringing about the union between the Granger and the Democratic parties, which resulted in the election of Governor William R. Taylor, and in the Granger legislation.

In 1874 Mr. BASHFORD ceased his editorial work and began the practice of law at Madison, Wisconsin, with the firm of Gill, Bashford & Spilde. In 1882 he became a member of the firm of Tenney, Bashford & Tenney, which did a very large commercial law business throughout Wisconsin and the neighboring states. In 1885 this firm removed to Chicago for the practice of commercial and corporation law and soon enjoyed a very large practice. The court work fell upon Mr. BASHFORD. After four years, feeling physically unable to longer stand the strain, he returned to the more quiet practice at Madison. He then formed a copartnership with James L. O'Connor, Thomas A. Polleys, and John A. Aylward. Subsequently Mr. O'Connor and Mr. Polleys retired from the firm, on their removal from the city; and the Bashford firm was continued as Bashford, Aylward & Spensley until Mr. BASHFORD's appointment to the supreme court bench in 1908.

Mr. BASHFORD was widely known as a lawyer throughout this and the neighboring states. The Wisconsin Reports for more than thirty years tell something of the story of his activity in the different circuits of this state and his active part in many important cases.

Mr. BASHFORD won his widest distinction as a lawyer in the prosecution of the State Treasury Cases, by which the state recovered from former state treasurers and their bondsmen nearly one-half million dollars. Mr. BASHFORD acted as special counsel for the state under appointment of the governor, and in connection with Attorney General James L. O'Connor and Senator Vilas he pressed them to a successful issue in the circuit and the supreme court. In matters of this kind, however many and however eminent counsel may be employed, upon one must fall largely the responsibility and burden of planning and performance. In the Treasury Cases this burden fell upon Mr. BASHFORD. Those cases well illustrate the method of the man. As soon as he was retained he took up the problems involved without personal or political prejudice or bias of any kind. Here he found what he best liked—a close legal question. He weighed it; he sifted it; he threw the light of reason and research upon it; he quickly reached his conclusion. He then laid his plans of attack and resistance as carefully as any general in the field lays his. He applied tireless energy in gathering his facts, and splendid ability in marshaling and presenting them, with the law applicable thereto.

What Mr. BASHFORD said in presenting the memorial of his good friend, Colonel William F. Vilas, to this court was strikingly true

of himself: "He possessed in a marked degree the fundamental qualifications for a lawyer—learning, judgment, and courage." Mr. BASHFORD had a broad general education. He was well informed on many subjects outside the law, and by constant reading he kept abreast of the times. He knew men and affairs, and took a deep interest in the affairs of the state. He knew business methods and applied them to his own business. He knew the law, knew its principles, and knew its application. His mind was strong, keen, and analytic. He was peculiarly free from prejudice and passion in reaching a legal conclusion. He saw things clearly. After reaching his conclusion as to the law applicable to the facts of his case he was courageous and tireless. Nothing could stay or hinder him. None of the law's delay could be attributed to him. He had a passion for completing his work. He was always ready, and his books and papers and cases were always in marching order. In the practice of commercial law, when through attachment, replevin, or judgment the law rewarded the diligent, he was like a captain in charge of a flying company, and he made many a forced night march. He was jealous of his working hours and allowed little intrusion upon them. The law was his passion. He loved it and gloried in its history of accomplishment and its roll of illustrious names. His standards for the lawyer, for the profession, and the practice of the law were high; and he lived up to his standards. He was a wise counselor and loyal to his clients. He was absolutely honest. Twenty years of my life were spent in daily contact with him. I never knew him to do a dishonest or dishonorable act or one unworthy of his profession.

In the earlier years of his practice he delighted in jury work. He was of a fine, commanding presence. He knew men and their motives. His language was clear and incisive. He came to the trial of his case with a knowledge of the law and the facts. He was fair, honest, and courteous with his opponent and the court, but he yielded nothing of his clients' rights. With a knowledge of the law and the facts, he was a power before the jury. But in later years he disliked the burdens and exactions of jury work, and took his keenest pleasure in trials and arguments before the court and in preparation of briefs and arguments before this court. His briefs were models in the marshaling of facts and the lucid statement of the law applicable thereto.

There were giants at the Dane county bar during his thirty years of practice. There was the inimitable Orton, the courteous Gregory, the learned Pinney, the eloquent George B. Smith, the industrious Bryant, the gifted I. C. Sloan, the dauntless Chynoweth, and the matchless Vilas. High among this splendid galaxy was Judge BASHFORD, cool, serene, and self-poised.

While Mr. BASHFORD devoted himself to the law, yet he felt that

every citizen owed a duty to the state as well. He served as city attorney of Madison during a critical period of its history. Later he was elected its mayor, and he faithfully served the city he loved so well. He also served as state senator from this district for four years. He was easily one of the leading and influential figures of that body. He served on many important committees, and his efforts and liberality combined with those of Robert B. Ogilvie saved old Camp Randall to the state of Wisconsin forever.

As a member of the law faculty of the University of Wisconsin Mr. BASHFORD lectured on corporation and commercial law, federal procedure, and fraudulent conveyances for a number of years. There was much of the true but old-fashioned schoolmaster about him. He took a peculiar delight in his work; he rejoiced in the contact with the strong and growing minds of the young men of the law school. He offered them no time- and thumb-worn manuscripts as an excuse for a lecture. Every lecture was carefully gone over the day before and brought up to date. Nor would he allow, if possible, any diversion, legal or social, to prevent his appearing at his best before his classes. He gave them the best of himself, and his spirit and the love of the law entered into many of them. His strong personality, his clear exposition of the fundamental principles of the law and its application, his great interest in his pupils, awakened in them a respect for him bordering on veneration. No instructor of the law school has left a better or more lasting impression on the young lawyers of the state than did Mr. BASHFORD.

Upon his retirement from this court he missed the stimulus arising from contact with younger minds. Though he never referred to it, I know it was one of the keenest disappointments of his life that on his retirement from the bench his services were not resumed at the law school.

In January, 1908, in the full vigor of a splendid manhood and after a long and active practice, with full and ripened legal store and grasp, he was appointed a justice of this court. The goal of his ambition was reached. Mr. BASHFORD had taken an active interest in matters political, but that is one of the duties such as every citizen owes to his state and nation. His ambition was legal, not political. Seldom has a lawyer come to this justly honored and distinguished bench better equipped for the intelligent, faithful, and judicial performance of the important work of this court. No lawyer has come to this bench with fuller appreciation of the high traditions and dignity of the office or with a more profound respect for the members of the court.

Here was a field for which he had a life of preparation. He entered upon his new work with almost boyish enthusiasm. While the work was arduous and wearing and no doubt told upon him,

yet he enjoyed it to its fullest extent. While his work on this bench was brief, yet the opinions of Justice BASHFORD illustrate what I have tried to say, that he had the attributes not only of a great lawyer but of a great judge—learning, judgment, industry, and courage. His failure of election was a great disappointment to him. Yet he never uttered a word of complaint; without a murmur he resumed the practice of the law.

Seldom in one family is seen so strong a quartet of brothers as Bishop Bashford, John W. Bashford, Reverend Samuel W. Trousdale, and Justice BASHFORD. Immediately following his retirement from this court Mr. BASHFORD was called upon to mourn the death of his brother John, his brother Trousdale, and his son-in-law, Mr. F. C. Spensley. Financial reverses followed. But there was no word of complaint. No one could detect that he had received a single blow. Yet the world was different. It had lost its charm, and the sturdy oak succumbed to the storm.

His last sickness covered a considerable period of time, but it left his faculties to the last unimpaired. I was with him much. He knew his days were numbered, and he looked into the future without fear. During a busy career he spoke little of religious matters. Now that opportunity was given for reflection, the religious training of a deeply religious and thoroughly Christian mother came back to him in all its force. He died as she would have willed that he might die, with a firm and abiding trust in the wisdom, justice, and mercy of an allwise Judge. He was ready and willing to go, and when the time came he called the last Court Crier, and said, "My good friend Death, come thou, and I will walk with thee."

The world is better because Mr. BASHFORD lived. While his services to his city and state will long be remembered, his name and his labors are secure to posterity so long as this court and its records shall survive. His opinions as a justice of this court are comprised in a few volumes; but his lucid briefs and his masterful arguments before this court are recorded in nearly a hundred volumes of your decisions. These are his monuments. As he contemplated his work he might well have exclaimed with the Latin poet:

"A monument to myself I've reared,
More lasting far than brass,
And higher than a regal dome,
'T will stand while ages pass."

JOHN A. AYLWARD,
For the committee consisting of
BURR W. JONES,
FRANK W. HALL,
WILLIAM R. BAGLEY.

On behalf of the court Mr. Justice KERWIN responded as follows:

My intimate acquaintance with Mr. BASHFORD was slight, covering only the period of his service upon this bench. The memorial here presented by those better qualified than I to speak of the life and character of Mr. BASHFORD before he was appointed a justice of this court gives quite a full account of the public and private life of the deceased. I can hope to add little to what is therein spoken.

Mr. BASHFORD was a cultured gentleman and an able lawyer. For many years before he came to this bench he was prominent as citizen and lawyer. He held various positions of public trust and took a lively interest in civic affairs.

In all his relations of life, public and private, he performed the duties imposed upon him creditably and well. He brought to the practice of his chosen profession a cultivated mind and a good knowledge of the law, and at the time of his appointment to the bench was regarded one of the leading lawyers of the state.

On the death of Chief Justice CASSODAY, Mr. BASHFORD was appointed a member of this court, but, having failed in election after appointment, served only about six months. The short term of his service afforded insufficient time for the full development of his judicial powers or the establishment of his fame as a jurist. What position he might have attained as a jurist had he remained upon the bench we cannot know.

It has been said, and I think truly, that constancy of employment is of itself a good and a great good, and that those judges who decide most cases decide them best, and that judicial office should be filled "by him who is wholly a judge, always a judge, and nothing but a judge." He who performs judicial duty faithfully and well earns the gratitude of mankind. Judges come and judges go, but the court remains, and the recorded opinions of its members, living and dead, bear evidence of the fidelity and efficiency with which they have performed their trust. Webster, in speaking on the death of Justice STORY, said: "Justice, Sir, is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself in name, and fame, and character, with that which is and must be as durable as the frame of human society."

Justice BASHFORD for a short period of time labored upon this edifice faithfully and well. His recorded opinions appear in volumes

134–136 inclusive of our Reports and speak for themselves. They are creditable and compare favorably with the opinions of other members of the court. Mr. BASHFORD during his time upon this bench was painstaking and thorough in his work upon all cases coming before the court for decision, laboring diligently and faithfully in the discharge of his duties. He was cordial in his relations with other members of the court, never arrogant or overbearing, firm in his conclusions when convinced that he was right, but at the same time ready to hear with patience and consider with deliberation all arguments to convince him that his conclusions were wrong.

After the expiration of his term by appointment to this bench he resumed the practice of his profession, but shortly was taken ill and rapidly declined in health until death released him from further duties of life. In his last illness he seemed like one stricken before his time had come or his life work was fully performed and while many years of usefulness might reasonably have been expected to still lie before him. But death is no respecter of person, age, or condition in life. The young and vigorous, the old and decrepit, king and subject, prince and pauper, the ruler and the ruled, fall alike before the weapon of death.

Strong in life, Mr. BASHFORD was also strong in facing death. After his robust frame had been shattered by disease and the time of dissolution approached, he was still courageous, cheerful, and hopeful. Death seemed to have no terror for him. He fought manfully the destroyer, but the messenger called him and he answered. The grave opened before him and he sank into its bosom while comparatively a young man. Such, however, is the dispensation of Divine Providence that when we are in the midst of life we are in death. No man can say when his day is done.

"Leaves have their time to fall,
And flowers to wither at the north wind's breath,
And stars to set; but all,
Thou hast all seasons for thine own, O Death."

The court indorses all that has been so well and fittingly said in the memorial.

We mourn with the bar the death of our associate, and extend to his afflicted family our sympathy.

Permanent record will be made of the proceedings.

JOHN F. DONOVAN.

Mr. W. J. Kershaw of Milwaukee then addressed the court and said:

May it please the Court:—JOHN F. DONOVAN, lawyer and orator, a member of this bar, died at Milwaukee February 18, 1912, at the age

of forty-two years. He was a native of Wisconsin and a graduate of our State University. His career as a lawyer was not unlike that of many other young men who have entered the legal profession in Wisconsin, except that he was endowed with a gift of oratory, a felicity of expression, and a quickness of intellect which distinguished him among the younger members of the bar. It may be said that he died as he stood at the threshold of his career. He had suffered the disappointments incident to unrealized political ambitions; had sounded the hopes and delusions of material professional rewards; and had just been called by the people of his district to serve a six-year term on the bench of the civil court of Milwaukee county.

Judge DONOVAN was a man of exalted ideals; enthusiastic by nature; genial, light-hearted, and generous. There was neither malice nor envy in his make-up. His devoted wife had for long been an invalid and this misfortune clouded the last years of his life. Her death occurred two days before his own. He witnessed her last agony, folded her hands in death, and then laid down to his long sleep. We can picture to ourselves this young man standing at the bedside of his wife, looking upon the dead face which to him had contained all that was womanly and beautiful in character. She was a noble woman, and I think it was fitting—it was kind of Fate to lay its hand upon his shoulder then and there and say to him: "Come, I will take you also."

Thus the hopes and ambitions, disappointment and sorrow of this short life found surcease in the grave. Life was but beginning for him; he had learned to know himself, had measured his limitations and taken account of his faults and imperfections, and in the future he saw within his grasp the solid satisfactions of life. The untimely death of this talented and brilliant young man presents to this learned bench and to his brethren of the bar the ever-unanswered query: What means this universal death?

Mr. Chief Justice WINSLOW responded on behalf of the court:

The Angel of Death is always unwelcome, but not always unkind. To the weary traveler who, after a long and laborious day upon life's highway, finds his early companions gone and the westering sun casting long shadows to the eastward, he brings rest from toil as well as release from bodily infirmities, and becomes ofttimes a benignant rather than a destroying angel.

It was not thus, however, with Judge DONOVAN.

Our friend was still comparatively young. He had reached the meridian of life, indeed, but no more. He was doing a strong man's work in a world that needs strong men. As one of the judges of an important court in a great city, he was using his unquestioned legal abilities for the attainment of that result than which none can be

nobler, namely, the doing of justice between man and man. As a citizen, his voice and influence were on the side of good citizenship. In his private life he was a staunch friend, a good neighbor, a devoted husband and father. One by one little children had come to him, and as they gathered about his knee his home became one of those beauty spots in life's landscape which only the happy home can be. It seemed that there were many years of usefulness before him both in his public capacity as a judge and in his private capacity as a citizen and parent. But it was not to be. In the midst of his usefulness, at the very height of his powers, he laid down his burdens in obedience to the summons which none can disobey.

In such a case we find it difficult indeed to understand or explain the Divine economy: when such a life is taken it seems that there has been a distinct and serious loss to society which cannot soon be made good.

But after all we may be very sure that when one has loyally done his duty day by day, as did our friend, his life, though not long in years, is in every true sense a full life.

Life is measured not by years, but by its character and by the quality of the service rendered to fellowmen. So measured Judge DONOVAN'S life was complete.

OGDEN HOFFMAN FETHERS.
WILLIAM SMITH.

Mr. O. A. Oestreich of Janesville then spoke as follows:

May it please the Court:—The committee appointed by the Rock County Bar Association presents the following resolution in memory of and as a token of respect for the life and character of our brother, OGDEN HOFFMAN FETHERS, whose death occurred on the 3d day of July, 1911:

Memorial of the Rock County Bar Association.

There passed away at his home in the city of Janesville, Wisconsin, on the 3d day of July, 1911, a distinguished member of this bar, Hon. OGDEN HOFFMAN FETHERS. A lawyer is an officer of the court. Into the records of the court he has in his lifetime written a considerable portion of his history. It is fitting, therefore, at the close of his earthly career, that an appropriate notice of his death should be entered upon the court record. It has been the custom of this court to pause in its regular proceedings upon the occurrence of an event of this character in order to permit a proper entry of such notice to be made. The Rock County Bar Association at this time accordingly presents this brief memorial of his life.

OGDEN H. FETHERS was born at Sharon Springs, New York, September 20, 1845. His father, Daniel Fethers, was of Dutch stock.

His mother was Laura Adams, of the Massachusetts Adams family. He attended school in his native village during his boyhood and then went to the Collegiate Institute at Fort Edward, New York, from which he took his bachelor's degree in June, 1863. The College of Christian Brothers at St. Louis, Missouri, conferred upon him the honorary degree of master of arts in 1872. In 1895 St. Lawrence University of Canton, New York, fittingly recognized his distinguished ability and unusual attainments by conferring on him the honorary degree of doctor of laws.

After completing his academic course he studied law and was admitted to practice in 1867. He engaged in educational work for several years after admission, for some years being professor of literature in Washington University in St. Louis. In 1877 he permanently located in Janesville for the practice of his profession, in association with his kinsman, the late venerated B. B. Eldredge. Five years later he formed a partnership with the late Hon. John Winans under the name of Winans & Fethers, and in 1883 Malcolm G. Jeffris went into this firm, when it became Winans, Fethers & Jeffris. Shortly thereafter Mr. Winans was elected to Congress, and after his Congressional term, in accord with the mutual convenience and wishes of the partners, the firm was dissolved, Mr. FETHERS together with Mr. Jeffris establishing the firm of Fethers & Jeffris. Mr. FETHERS continued as the head of this firm for upwards of twenty-five years and until his voluntary retirement from the field of active work shortly before he died.

As a lawyer Mr. FETHERS was successful to a degree rarely attained at the bar. He had many clients. These clients had important business. He served them to their satisfaction and received large rewards and emoluments. He accumulated a competence. He possessed great natural ability and distinguished attainments. He had an extraordinary mind, and was unusually gifted as a thinker, writer, and speaker. As a jury trial lawyer his reputation became state wide, but especially in his own circuit was he sought for this service. In his prime there were few important cases tried in the Twelfth circuit wherein Mr. FETHERS was not engaged. He fought tenaciously for his client and his interests, and the case in which he was engaged engrossed him to absorption. Among the lawyers of name and fame in this state he stood in the front rank. In the arena of legal controversy he met many distinguished members of the bar and was admittedly a worthy opponent of any. He was constitutionally destined to succeed and to have a most abundant success, for he had fine mental endowments, a broad culture, fluency and eloquence of speech, and withal a handsome face, a stalwart figure, and an impressive presence such as are altogether rare. His professional career was unusually successful and prosperous. As an eminent lawyer and scholarly gentleman he is remembered most kindly by the brethren of his profession.

Apart from his professional occupation Mr. FETHERS gave wide sway to his activities, and his success in many directions was of high merit. For a full quarter of a century he enjoyed the acquaintance and confidence of the leading men of his political party, not only in Wisconsin but at Washington. He was often called upon by the United States senators and governors of his state and by the state central committee of his party for counsel and advice. He was often a delegate and twice permanent chairman of the state convention of his party. He never sought political office, although there was no office that he could not have filled with distinction. He was quite pleased now and then, as a matter of civic pride and duty, to serve his city when asked and as he felt that he was needed. He preferred to serve in those positions where the liberal-minded citizen serves without money compensation, where the spirit of *noblesse oblige* has full sway. For many years he was a member of the school board. He particularly interested himself in local organizations for the promotion of literature, music, and art. He was a generous patron of any undertaking for the general betterment of Janesville.

By appointment of the governor Mr. FETHERS was a commissioner from Wisconsin to the centennial celebration of the establishment of the federal government, held in New York April 30, 1889.

Governor Scofield appointed him a regent of the University of Wisconsin. The position was to his liking, and he held it by successive reappointments for a number of years. This was a period when such men as Colonel Vilas, Judge Noyes, and Senator Stout were regents, and the position opened an attractive field for Regent FETHERS, both because of its associations and because of the character and importance of the interests to be cared for. Mr. FETHERS's regency was contemporary with the administration of President Charles Kendall Adams. The friendship which existed between Regent FETHERS and President Adams was very close, and it continued uninterrupted until the death of the president in California.

Mr. FETHERS was a commissioner to the Paris Exposition in 1900, and vice-president of the American Commission. President McKinley conferred upon him this distinguished honor, and it can be truthfully said that, among the eighteen appointees from this country chosen for their ability and standing, he was conspicuous mentally, physically, and socially, represented the United States with honor and dignity, and reflected credit upon his country.

Mr. FETHERS was a public-spirited and patriotic citizen. He loved his country, its government, its institutions, and its people. While not a blind devotee or superstitious idolator of constitutions, he believed in the constitution of his country and was grateful to the fathers who framed it. He was familiar with the history of its adoption and knew the theory of its government. He had no patience with the agitation that labors to point out imaginary shortcomings in our national charter, and, with all the intensity of his nature, he

was opposed to those whose purpose is to tear it down or remake it. He was always and everywhere the champion of representative government and the stalwart opponent of everything that threatened its foundation. He was intolerant of demagogy and noisy agitation. He was a genuine American citizen of enthusiasm and high ideals, and a sincere friend and helper of every activity for his country's good.

The Rock County Bar Association recommends that its committee, as soon as practicable, present the foregoing memorial to the circuit court for Rock county and to the supreme court of Wisconsin and ask that the same be spread upon the records.

M. G. JEFFRIS.
JOHN M. WHITEHEAD.
THOS. S. NOLAN.

Mr. Oestreich also read the following tribute by M. G. Jeffris, who was to have presented the memorial but was unavoidably absent:

In presenting this resolution on behalf of the bar of Rock county, I feel that I should add a word of personal appreciation and respect. My personal relations with Mr. FETHERS, beginning with professional and business association many years ago, were most cordial, friendly, and confidential, and based upon that mutual respect which is essential, I think, to perfect friendship; and those relations were without a break or flaw at any time. For upwards of thirty years, and from my early manhood, he and I were partners and business associates in our chosen profession, and this association developed ties of friendship, confidence, and affection so strong that in his death I have suffered a great personal loss.

Mr. FETHERS was born in 1845 in the state of New York, of strong Dutch and Puritan ancestry, and the spirit of fidelity and courage was his by inheritance. He received a common-school education, finally graduating from Fort Edward Collegiate Institute. He engaged in educational work and studied law, and some years after he was called to the bar he located in Janesville, Wisconsin, where he really began and ended his battle in and with the world. Without money or influence, but with brains, education, health, industry, and character, his was the typical beginning of most of the youth of our country; and though his means were meager in the early years of his life journey, his natural endowments were such that success and a competence rewarded his toil.

He was a painstaking, able, and conscientious lawyer; an orator of marked power and an opponent of rare courage. His clients' interests were his interests always. His shrewdness, sagacity, and promptness soon won him an enviable reputation that was not confined to the limits of his city or county, while the value of his counsel was evidenced by the complicated matters intrusted to his care.

As an advocate in the trial of jury cases he was pre-eminently successful, and achieved a reputation as one of the best jury lawyers in the state.

Mr. FETHERS was a man of fine culture and literary and artistic tastes. He loved oratory, literature, music, and all the arts; he loved his home, his family, and his friends. He was a man of decided abilities and varied and liberal attainments as a student and as a scholar. He was one of the most liberal patrons of the literary, musical, and educational institutions of his city and state. His wide literary reading and taste and culture made him at all times a cheerful and entertaining companion, and, to those so favored, a delightful host at his beautiful home.

He had absolutely no patience with sham or incompetence. His was a life of usefulness and efficiency. All his abilities centered about that pivot of action and conduct. He believed that the only aristocracy and the true aristocracy was the aristocracy of useful and efficient men and useful and efficient women. His hatred of pretense and inefficiency in all its forms made him at times somewhat intolerant and severe upon the shortcomings of others. He expected—almost demanded—that others be as strong as he was himself, and it was not easy for him to overlook the failings or shortcomings of the weaker and less fortunate.

Intense of feeling, opinion, decision, and conduct he was from early manhood. He was not of robust health until after thirty years of age, and I am of the opinion that the struggles of his youth against physical delicacy and even ill-health had much to do with the development of his intense character. His nature made it impossible for him to be indifferent toward anything attracting his attention. He was always decided and confident in opinion and fearless in the expression of his thought. His intensity of feeling and opinion was so strong that those of contrary opinion were at times caused to feel that he was intolerant or uncharitable of theirs. Yet he was intolerant and uncompromising only when he felt that contrary opinions and feelings were the result of insincerity, pretense, or incompetence.

Loyalty was also a striking feature of his character. He came of a loyal ancestry, and the influence of that heritage was manifest in all the phases of his busy life. His loyalty to his friends reached in its intensity the point of genuine chivalry. His solicitude for the welfare of his friends caused him many personal sacrifices. His heart, his brain, and his purse were welcome to them. He was loyal to them because he believed friendship to be a sacred association. He was intense in every way, and, together with this intense loyalty to those he liked, he had also an uncompromising memory for the acts and deeds of those who incurred his displeasure or distrust, which made it difficult for him to resume friendly relations with those he thought had done him or his friends some injury or wrong.

While not free from shortcomings, take him all in all Mr. FETHERS was a strong, courageous, capable, and cultured gentleman. Rockribbed by integrity and probity, his conduct was ever just and honorable. The dignity of his manhood spurned all that was mean and worthless. While he maintained a somewhat studied courtesy, I think it was not superficial, but rather an expression of the true dignity of the man and the dignity of the profession of which he was an honored member. His virtues lent a charm of manner and social attractiveness that gave him prominence. He was a man of varied activities and deeds. In his own home, in all of his social relations, in the prosperity of his material conditions, in everything which goes to make up a happy and contented life, he had entitled himself to, and had, "honor, love, obedience, troops of friends." Many a man living today will long cherish in memory, because of some pleasant service performed or some valuable assistance rendered, his association with OGDEN H. FETHERS. And the city and state in which he lived have in his departure lost a strong and patriotic citizen.

The uncertainty of human life looms up ever before us and seems to make all human achievements futile and worthless; but this is only apparently so. Men pass away, but their works endure. The body may be laid away, but the rich legacy of lessons and influences of the life of a good, brave, and honorable man remain to us and to our children. The silent influences of such a life bear harvests which death cannot destroy. And, while we miss his genial presence, the ring of his cheerful voice, the warm grasp of his hand, while we shall often look for the face we cannot see and listen for the voice we cannot hear, he will live with us all in our memory; and in the faith and hope of his immortality and of our own, we say of our departed friend, "Hail and farewell!"

Mr. Thomas S. Nolan of Janesville then presented the following

Memorial of the Rock County Bar.

May it please the Court:—WILLIAM SMITH, who was an officer of this court for forty-six years, is dead, and it is proper and the wish of the members of the bar that we should pay some fitting tribute to his memory.

WILLIAM SMITH was born May 1, 1841, at Dover, Province of Ontario, then known as Upper Canada. He was of English and Irish lineage. His father and mother were both natives of New York. His paternal grandparents, natives of Massachusetts, were of English ancestry, and his maternal grandparents were born in Ireland.

From September, 1841, Mr. SMITH lived in Rock county, and made his home in Janesville since April, 1864. He received a common-

school education. He also attended Milton College and the University of Michigan, in the law department of which he pursued a course of law studies. He also studied law in the office of Charles G. Williams of Janesville. He was licensed to practice law and became a member of the Rock county bar in February, 1865. Later he was admitted to practice in the state supreme court and the federal district and circuit courts. He began the practice of law alone in 1865. Later he became associated with M. M. Phelps under the firm name of Smith & Phelps. After the dissolution of this firm he entered into a partnership with Mr. Charles E. Pierce, the firm name being Smith & Pierce. Subsequently he became a member of the firm of Jeffris, Mouat, Smith & Avery, and continued this connection until his death.

He was always more or less active in politics, and filled the offices of justice of the peace, police justice, and city attorney of Janesville. He was president of the Rock County Bar Association for several years prior to his death. When he was a young man he was quite prominent in the Young Men's Association of Janesville, which thrived here several years as a social and literary organization. The Young Men's Association accumulated quite a considerable library, which was eventually taken over by the Janesville Public Library.

He was a Democrat in politics and a Unitarian in religion. He was married April 9, 1868, the maiden name of his wife being Louise M. Steele. She survives him. They had one child, Evelyn Louise, who was born July 15, 1872. She died July 15, 1882. He died in Janesville, after a short illness, March 29, 1911.

It may truthfully be said that Mr. SMITH had no quality or failing that it is necessary for us to disguise. He was of a friendly, sociable nature, and heartily enjoyed his friends. He never failed to look upon the humorous side of any question, and usually had a story peculiarly appropriate to fit every occasion. He was a good lawyer, an able advocate, and a particularly formidable opponent in a case which it seemed probable he would lose. He was said to be the most resourceful lawyer at the bar, and there is no one of us who has been pitted against him who cannot remember instances of his remarkable ingenuity in the trial of a case, and particularly in argument. He had few equals as a trial lawyer. He was always kind and thoughtful in his dealings with the younger members of the bar, and there is no occasion where he treated an opponent, no matter who he might be, with other than the utmost kindness and courtesy. Whenever the opportunity offered he would interject some joke or witty comment into a trial, at the expense of his opponent or the court, but there was no sting in his humor—it was the emanation of a clean heart and a rollicking, fun-loving mind.

The records of this court and the various courts in this state testify to Mr. SMITH's activity and prominence in his profession. His

practice was general. He drew no line. He was equally at home in any court, and he apparently enjoyed and was as much interested in the defense of an assault and battery case in a police court as he was while participating in a more important contest in the circuit or supreme court. This variety in his practice brought him into frequent contact and contest with the younger as well as the older members of the bar, all of whom appreciated his great ability, his cheerful, generous spirit and joviality.

It therefore follows that these memorial services are not perfunctory. They are sincere, and an honest expression of our feeling toward our departed brother. When WILLIAM SMITH died we lost a leader in our profession, a good citizen, and a true friend.

And as a further testimony of respect to his memory,

Resolved, that we, the members of the Rock county bar, mourn his loss, and respectfully request that this memorial be spread upon the records of this court, and that the same be also presented to the supreme court.

Dated February 26, 1912.

THOS. S. NOLAN.
M. O. MOUAT.
J. B. DOW.
ALEX. E. MATHESON.

Mr. Charles E. Pierce of Janesville then said:

May it please the Court:—It was my good fortune to know WILLIAM SMITH intimately. In the first case I ever tried he was the opposing attorney. Afterwards for many years we were partners in the practice of law in the city of Janesville. Mr. SMITH had one of the most subtle as well as one of the most logical minds I have ever known. Not in my time at the Rock county bar has there been his equal in logic. With him the law was an exact science, founded on a set of principles, and all questions could be determined logically from those principles. In a contested case, no matter how overwhelming the facts presented by his opponent, no matter how impregnable the legal position of the adverse party appeared, Mr. SMITH would always come forth with an analysis of the facts and a logical argument of what the law was and should be, and thus present a perfect solution of the question and an unanswerable argument. He was greatest in difficult cases requiring close thought and ingenious reasoning. Decisions on different state of facts or on misapplication of principle had little or no effect on his mind, but his mind was not stubborn or that of a bigot. He was at all times open to conviction; and if you could show him he was mistaken in the application of the principles, or his logic was based on a wrong premise or was faulty, he would retrace his steps and recede from his position with great alacrity. His mind was active and acute, strong as well as agile, the exact opposite to his body, which was large and bulky,

with little physical strength and vitality for its size. As a trial lawyer he excelled in the argument of difficult legal propositions to the court and in presenting and analyzing the evidence to a jury. His language was concise and apt, and he had the happy faculty of carrying to his listeners' minds the exact thought that was in his own mind. Necessarily, to do this, he thought clearly.

There was another side to Mr. SMITH. He had a keen sense of humor and he would apply his wit to friend and foe alike. But there was not in anything that he ever said a particle of ill-will or malice. His charity for mankind, like his mind, was large and broad. No matter how bad the man, no matter how truthfully you were speaking of his wickedness, Mr. SMITH could always find a good side and relate a good trait or a good deed. He was ever helpful to the unfortunate and misguided. If he ever suffered wrong at the hand of another, he did not cherish hatred or malice or desire revenge, and these qualities I think came from his deep religious nature. While he was not a member of any church or a subscriber to any creed, he was always deeply interested in everything of a religious nature; tolerant of the views of others, and yet thoughtful and studious on all religious subjects. With all his mental strength and wide experience and his quick wit he was modest and unassuming,—too much so for his own worldly good.

He was beloved by the younger members of the bar. He always had time to give a brother attorney advice, to lend him assistance in his troubles about his cases, and without charge. To him it was ample compensation that he had their gratitude and respect.

To know Mr. SMITH, to be in the office with him, was not only to love him, but to have for him that deep respect that comes from the association with men of great fairness and ability, and also to have that still greater respect and veneration which only association with a real and truly good man begets. The bar of Janesville has lost its best legal mind, his friends one of the dearest characters that they will ever know, and none who follow can fill the vacancy made by the passing of Mr. SMITH. He by his good deeds, beautiful thoughts, kind words and acts, brought forth from all with whom he associated the best that was in them.

The greatness and goodness of such a man cannot be measured by the records of cases won, wealth accumulated, or station gained, and is only known and appreciated by those who were fortunate enough to be closely associated with him.

On behalf of the court Mr. Chief Justice WINSLOW responded as follows:

The bar of Rock county has been a strong bar since the very earliest days of the history of the state. It has furnished to this court

two chief justices, and has always maintained its full quota of able lawyers. In this class for many years stood OGDEN H. FETHERS and WILLIAM SMITH. I knew them both well and I prized their friendship.

During the time that I occupied the bench of the First judicial circuit, Janesville lawyers transacted much important business in the circuit court for Walworth county. For a number of years hardly a term passed in that county at which important cases participated in by Rock county lawyers were not tried. Mr. FETHERS and Mr. SMITH each had his share of these cases, and thus I was given ample opportunity to judge of the ability and character of the two men.

While they were both men of intellectual strength and of commanding presence physically, two men could hardly be more different. Mr. FETHERS was pre-eminently a man of quick perceptions, rapid intellectual processes, and ready wit.

He was deservedly eminent as a citizen and as a lawyer, but it was as a public speaker, I think, that he specially excelled. He was equally at home at the bar or on the political platform. Pleasing in his personal appearance and captivating in his manner, he combined solid argument and well-nigh faultless rhetoric with a sparkling and irresistible humor, and he embroidered them all with the most charming flowers of fancy. He had also the actor's command of expression and gesture, and these gifts added in no small degree to his strength as an orator. He was not merely a learned lawyer; he also possessed a remarkable store of knowledge upon all of the great scientific and literary movements of the time, and this knowledge made his conversation as interesting as the bubbling humor with which it was permeated made it delightful. There was furthermore a deep vein of true sentiment in his nature which bound him to his friends and his friends to him. His death leaves a vacancy in the bar which it will be hard to fill, and the vacancy which it leaves in the hearts of his friends will never be filled.

In many respects Mr. SMITH was the direct opposite of Mr. FETHERS. He was as slow and deliberate in his physical and mental action as Mr. FETHERS was quick and impulsive. He was a ripe lawyer and a man of exceptional mental ability, yet it must be said, I think, that he was by nature adverse to hard intellectual labor. It seemed to be necessary that he be placed in a position where he was *compelled* to exert himself before his strong qualities really came out. When he was crowded to the wall his intellectual strength showed itself and his powers came into full and often brilliant action. He needed a hard, if not a desperate, case to bring out the stuff that was in him, and when such was the situation his great frame seemed to become leonine in its strength, and his blows became the blows of a veritable sledge hammer.

It has been said that a man cannot be generally known by the name of "Billie" and be really a great man; but whether this be true or not, I think it is certainly true that a man cannot be generally known by the name of "Billie" unless he be a lovable man. Mr. SMITH was known by everybody as "Billie" SMITH from his youth to the day of his death, and in giving him this loving name his fellowmen made no mistake.

Whatever his faults or his weaknesses (and who of us is free from them?), they did not affect the solid character of the man, and that character entitled him to that full measure of the love and respect of his fellow citizens which he always received.

Mr. Justice TIMLIN filed the following response, relating to Mr. FETHERS:

I wish to supplement what has been said by the court for us all with a few words for myself. I do not readily yield to friendships. Mr. FETHERS was one of the small circle of my friends. Writing to me from Cuba about two years ago he said: "I am for you against all comers." This saying, in a way, expresses also the feelings I entertained toward him.

He who wrought well, but only for his time; whose life is linked with no great event; who leaves no children; and who has at the end no gifted chronicler, will not be long remembered. This is the gloomy outlook for the fame of OGDEN HOFFMAN FETHERS which under other circumstances might shine as a beacon for those yet upon life's voyage. The darkness of oblivion will soon enshroud his personality and his work. I would that it lay in my power to light even a small candle that would keep his obit, at least in a little space, and for a short time. But I am unequal to the task. I can only say: He was gifted with grace and strength and intellect far beyond what is ordinarily given to men; he was a ripe scholar; a powerful orator; an accomplished lawyer; a worthy citizen. Gifted with a fine presence, a sparkling wit, a rare power of analysis, an overmastering eloquence, he was a formidable antagonist in the forensic contest. He had a manly courtesy of a quality neither cringing nor condescending and at the same time courage to assert and ability to vindicate his rights. There was in the sum of his qualities something which always suggested to me the gallant English gentleman of the days of Shakespeare, Marlow, and Raleigh; one that could deliver an epigram or a riposte; one that could write or fight. It is hard to contemplate his death. Here achievement ends. Here between him and us falls the curtain which shuts out from us the great mystery. Here we reach the uttermost boundary of human knowledge. We have neither strength to save nor wisdom to understand. Feckless children of the like doom we can only wail and wonder. We sorrow as we loved; fear as we think; hope as we

have faith. Love ever offers a wreath to the undiscerning dead, but small solace to the surviving; thought can only bring us the vague fears of Hamlet or Claudio, or the agnostic indifference of the stoic; unshaken faith may enable us to meet the Death Angel and view his work like the good Moslem:

"'Thou blessed one!' the Angel said, 'I bring thy time of peace.
When I have touched thee on the eyes life's latest ache shall cease;
God bade me come, as I am seen, amid the heavenly host.
No enemy of awful mould, but he who loveth most.'

"'Dear Angel! do what thou art bid,' quoth Jelal smilingly,
'God willing thou shalt find today a patient one in me.
Sweet is the cup of bitterness that cometh in such wise.'
With that, he bowed his manly brow,—and, Azrael kissed his eyes."

JAMES G. WICKHEM.

Mr. Joel B. Dow of Beloit presented the following

Memorial of the Rock County Bar.

May it please the Court:—It has been written that

"When a good man dies
For years beyond our ken,
The light behind him lies
Upon the paths of men."

Such an one, a good man, died in the city of Beloit in January of the current year. JAMES G. WICKHEM thus finished his course here and passed into the waiting heavens.

He was a lawyer. The bar of Rock county recognized his passing on, his ability and worth, and the circuit court affirmed this expression of the bar.

Mr. WICKHEM's antecedents,—his father and mother were Irish. John Wickhem and Catharine Joyce, natives of Wexford, Ireland, coming to America with their respective parents about the year 1849, settled in Portland, Dodge county, Wisconsin. The two soon after married and were tillers of the soil. There were six children born to them, JAMES G. WICKHEM, the third son, October 30, 1857. His early educational training was at Waterloo and Marshall Academy. He taught one year in Dodge county after leaving the academy, and then in September, 1878, entered the University of Wisconsin, where he remained three years and then took the regular law course there, graduating with honors. He served as principal of the Sun Prairie high school for one year, and after that, going to Beloit, he entered upon the practice of his profession. He was first there associated

with Cornelius Buckley, then with George B. Ingersoll, and later alone through the years of his work.

In his practice, aside from prominent members of the bar of Rock county still living, he came in contact with such men as Judge Conger, Judge Bennett, Chief Justice Cassoday, Mr. Todd, Mr. Fethers, William Smith, and others, all of whose high esteem and friendship he won and retained.

August 24, 1887, he married Miss Mary V. Dunn of Madison and founded a home. There were born to them three children, a son and two daughters, all of whom are living in the light he left behind him.

For twenty-five years Mr. WICKHEM maintained his home, reared and educated his children, and schooled them for useful lives. He made much of his home. He early impressed upon its inmates the sacredness of its character and use.

Mr. WICKHEM was an able lawyer and, as such, a man of strict integrity and of unsullied reputation. Intuitively he seemed to grasp the fundamental principles of law and their application to human relations, and he inspired confidence among all who availed themselves of his counsel and service. He early gave promise of a successful career, and during the brief years he was permitted to engage in active practice his genius and skill in directing and handling cases in the courts was so marked that he challenged a clientage increasingly large, until he was suddenly stricken down in the dawn of life's promise, when for seventeen weary years he battled against the grim destroyer, dying finally at the age of fifty-five. The records of this court in several important cases emphasize the legal ability and sound judgment of the man.

In his practice, it may be said, he never inspired or encouraged litigation. In the settlement of differences between men, where rights were claimed to have been invaded and questions of law involved, he sought to bring the prospective litigants together, harmonize their differences, and make them friends again. And in these well directed efforts their fruitage was often apparent in restoring peaceful, harmonious relations.

Though mediatorial in his offices, however, where injustice to his clients was apparent and he found an unyielding insistence, Mr. WICKHEM was a most formidable antagonist, and he was scathing in his rebuke of the would-be perpetrator of wrong. With him the emoluments of his profession were comparatively of little moment when he could be used as an instrument of service for the doing of good to his fellows. No toiling, weary mortal ever came to him for counsel, sympathy, or encouragement and was turned empty away. Without money and without price, he freely lent to such his aid.

Mr. WICKHEM was a lover of men, not for what they possessed, but for what they were; and in his intercourse and dealings he crys-

tallized as did the Galilean prophet the ten commandments into one—love to God and love to man. And what he himself reflected of love, charity, and good will to his kind was largely awarded him in return. Without the seeking, essentially, upon his part, he was given places of trust and emolument, and the helping hand, when physical disability came upon him, was cordially extended, and seldom was there truer emphasis apparent of the truth of the scriptural declaration than in his case, "With what measure ye mete, it shall be measured to you again."

Mr. WICKHEM was essentially of a religious nature and was possessed of profound reverence for the Infinite Power which created and gave to man dominion. He ever recognized his fellowman upon an equal footing with himself, and to do as he would have done was inborn and daily manifest.

His membership in his church, St. Thomas Catholic, was no meaningless factor to him, and his loyalty and fealty was enduring to the end. He was a helper and a builder, and his religious life as an open book appealed to men as he came in touch with them and as a life which challenged a counterpart. Mr. WICKHEM's religion, however, his faith and charity, was broader than church, creed, or dogma, and he recognized as legitimate every man's right to seek and to worship according to the dictates of his conscience.

Peculiarly expressive of this marked type of the man were the words of his devoted pastor and friend of twenty years, Father M. J. Ward, at his funeral obsequies. He tenderly reviewed the untarnished pages of his Christian fellowship and work, and, with the benediction of a changeless love, he awarded to him the Master's commendation—well done.

Though of purely Irish descent, Mr. WICKHEM, reared and educated in American institutions, was essentially American and loyal to her laws and usages; but he was possessed of a profound veneration for the "auld Emerald Isle," where his coming was prophesied, and he was ever one with his fellow countrymen here, who were alike partakers of the liberties of a free republic. His Irish descent he accounted as a legacy and he was proud of his Irish ancestry.

He was a Democrat in politics and an uncompromising advocate of the early fundamental principles of the Democratic party. Among those of his political faith he was a pronounced leader and teacher, and his integrity of purpose and loyalty to his party found early expression; and during the Cleveland administration he was given the lucrative position of postmaster of his home city.

Mr. WICKHEM was possessed of an unbounded good nature and imbued with rare social qualities. He was companionable in a marked degree, both in the home and in social and business relations. Anecdote, "Irish wit," and repartee he keenly enjoyed in others, and there was no lack upon his part in ready response. And this character-

istic of the man, aside from the good cheer and uplift it gave to others, served to "spread a table in the wilderness" before him and to rift for a time the clouds of sorrow and suffering which burdened his years. Few there were, outside the inner sanctuary of his home, who knew of his heroic efforts to utilize every faculty with which he was endowed to stifle the voice of unrest and repining and how well and nobly he achieved the victory.

And so, to be possessed, as he was, largely of all the attributes which contribute to the unfoldment of man,—keenness of intellect, unswerving integrity, love of home, consciousness of its place and use, reverence for the Infinite, faith in the unseen realities and man's immortality, and knowing with all how such endowment could be utilized and how the world needed men of such stamp to stem the tides of iniquity and to eliminate the trails of mistaken belief,—knowing himself all this and how effective could be his part,—to be thus precluded, to be thus circumscribed, to be merely in the larger sense and in the prime of his years but an onlooker,—in the light of the fact, then, that our brother, JAMES G. WICKHEM, never loosed his grasp, never weakened in faith, never faltered by the way, till the end came, of him may we not truly say that such example, such heroic living and heroic dying, did kindle a light which today "lies upon the paths of men" who are following on.

"The sweetest lives are those to duty wed,
Whose deeds, both great and small,
Are close-knit strands of unbroken thread
Where love ennobles all.
The world may sound no trumpets, ring no bells;
The Book of Life the shining record tells."

JOEL B. DOW,
JOHN C. ROOD,
THEODORE L. WOOLSEY,
Committee.

Mr. Chief Justice WINSLOW responded for the court:

My acquaintance with Mr. WICKHEM was quite limited and hence I am unable to speak of him from the vantage ground of intimate personal knowledge of his qualities.

I know enough, however, to be assured that the estimate placed upon him as a man and a lawyer by the memorial of the bar is well deserved.

The court joins with the bar in paying tribute to the memory of a good lawyer and a good citizen who has been called to his rest while comparatively young in years.

The several memorials are ordered to be spread upon the records of the court in enduring remembrance of our deceased brethren.

EPHRAIM MARINER.

On the 8th day of October, 1912, Mr. Frank M. Hoyt of Milwaukee addressed the court and said:

May it please the Court:—Mr. EPHRAIM MARINER, a member of the bar for sixty years and one of the great lawyers of this state, died on the 24th day of January, 1911.

Mr. MARINER was born at Penn Yan, Yates county, New York, on the 27th day of March, 1827. After attending the public schools of his native town and then studying under a private tutor, he matriculated at Hamilton College in 1846 and graduated therefrom in 1849.

During his college course he studied law as an extra study under the supervision of the famous Professor Dwight. After he graduated he entered at Penn Yan the law office of Evert Van Buren, a prominent lawyer in western New York.

In 1850 he came to Milwaukee, became a student in the office of Coon & Hunter, and was admitted to the bar in 1851. During the years 1852 and 1853 he was associated with Charles James, the firm name being James & Mariner. Subsequently he entered into a partnership with Mr. Wallace Pratt, under the firm name of Mariner & Pratt. From 1872 to 1876 he was the senior partner of the firm of Mariner, Smith & Ordway. With these three exceptions, Mr. MARINER during his long career at the bar practiced alone.

For a period of upwards of twenty-five years Mr. MARINER was engaged as a general practitioner. He very early attained and thereafter ever maintained his position as a leading member of the bar.

We all know of the unusual strength of the Milwaukee county bar in the early period of its history, when it numbered among its members Jonathan E. Arnold, Edward G. Ryan, A. R. R. Butler, Matthew H. Carpenter, and others of almost equal ability. By these men Mr. MARINER was received as an associate to be welcomed and as an antagonist to be feared.

He had a large part in framing and moulding the law as it has been established in this state. In the first thirty or thirty-five volumes of this court's Reports his name appears as counsel in very many important cases, in a large majority of which he was successful. At the time of his death he had practiced more years before this court than any other lawyer.

After the dissolution of the firm of Mariner, Smith & Ordway in 1876, Mr. MARINER gradually withdrew from the general practice and thereafter devoted himself to his private business and to the management of the legal matters of large concerns in which he was personally interested.

As a lawyer he possessed in a very high degree the power of close analysis. He got down to the very heart of a question presented to

him with surprising quickness. His knowledge of the principles and foundations of the law was accurate and certain. His judgment was almost infallible. Joined to this was a disposition and an ability to do hours of hard, continuous labor. For a great many years, practically without a vacation, he worked in his office day after day from morning until night, often prolonging his labors to late hours. Long after the ordinary man would have stopped exhausted, he continued his work without giving at any time any evidence of the slightest mental fatigue.

He prepared his cases with the utmost care, leaving nothing to chance. He always went into court fortified against surprise. With his natural ability, supplemented by his profound knowledge of the law and his careful and laborious preparation, it is easy to understand why he was almost invariably successful and why his opinion was relied upon, both by his professional brethren and by his clients, with absolute confidence.

He loved his profession and held himself rigidly to the observance of the very highest standard of professional ethics. He was scrupulously fair and upright in his own dealings and he expected like treatment from others. He readily forgave errors, mistakes, and weakness, but never an act of intentional deceit or dishonesty.

His predominating characteristic was indomitable courage. Like every man however able and careful, he at times met with reverses and misfortune, but no misfortune however great, no loss however large, seemed in any way to affect him. If the matter offered a chance for solution he never surrendered, but kept at work with a dogged persistency that more than once brought success out of desperate situations. If, after every effort, the case proved hopeless, he dismissed it from his mind fully and entirely. It was apparently as completely forgotten by him as if it never existed.

Mr. MARINER, while endowed in the highest degree with the faculty of cold, passionless reasoning and exercising that faculty in every detail of his professional and business life, was, notwithstanding, of the kindliest and most affectionate disposition. He was at all times thoughtful and considerate of others. He bound his friends to him by frequent acts of kindness. If any of them went to him for assistance it was freely given, and if needed in the form of pecuniary aid it was rendered in a way that spared the recipient from the slightest feeling of humiliation. He contributed liberally to charitable associations and objects, and his acts of private benefaction were very many, but in each case what he did he did quietly and without display.

His whole life is a splendid example of how much can be accomplished by courage and by hard, persistent work. He commenced his career in Milwaukee practically without a penny, without the aid of influential friends, relying wholly upon his own exertions.

He reached the very first ranks of his profession. He accumulated a large fortune. He had the esteem and respect of all who knew him. He won the steadfast affection and love of those whom he admitted to his friendship. He lived to an advanced age, retaining to the last, without the slightest visible impairment, his remarkable intellectual faculties.

His friends miss his genial presence and the sincere welcome he always extended them. They cherish his memory as one who won their admiration by his brilliant intellectual qualities and their love by his kindness and generosity.

Mr. Moses Hooper of Oshkosh then spoke substantially as follows:

May it please the Court:—It was my good fortune to know Mr. MARINER for many years. He was a brother lawyer for over fifty years, and a friend from our earliest acquaintance.

He came to the practice of the law thoroughly prepared by diligent study and thoroughly fit in native capacity. He could hardly fail of success as a lawyer, though his lot was cast at a bar of great ability. I have not met a man more logical, more acute, more fit for the law in every respect except that of florid oratory, which he never attempted.

Webster said the proper epitaph of a good lawyer is, "He lived well and died poor." This is not a fit epitaph for Mr. MARINER. He lived well, but did not die poor. He couldn't die poor. He had such a grasp upon affairs—capacity for such business prospective, combined with such ability in his profession—that he could not fail of financial success.

On trial of an important case a physical difficulty showed itself. Arising to speak, he fell helpless from no apparent cause. Thereupon his physician gave peremptory orders that he refrain from the trial of causes. With the greatest reluctance he obeyed orders and withdrew from general practice. Thereupon his capacity for large business affairs shaped his future.

He lost through default of others hundreds of thousands, but he turned his back upon failure, let the past be past, and faced the future only to achieve greater success.

He was my client for over thirty years. As such, he was kind, appreciative, and generous. He took success graciously and defeat without complaint or censure. He was in large combinations, both in general business affairs and in legal contentions. But he dominated whatever combination he found himself in, whether of litigation or business.

He never entered on a contention which his sense of right did not justify. But, having put his hand to the plow, he never looked back. The fight must be to a finish.

Ephraim Mariner.

His leading characteristic was tenacity of purpose. Therein is the secret of his success. I think that when Dr. Holmes wrote his Rhymed Lesson he had in mind just such a man. He no doubt had met such. He says:

> "One constant element in luck
> Is genuine, old, Teutonic pluck.
>
> Stick to your aim. The mongrel's hold will slip,
> But only crowbars loose the bull-dog's grip.
>
> Small though he seems, the jaw that never yields
> Drags down the bellowing monarch of the fields."

With his brother lawyers he was very genial,—unusually companionable,—a jolly fellow, but never frivolous.

To his family he was most tender and affectionate, and in his care of them, not simply generous, but lavish.

He was a devout man. He had no creed, belonged to no sect. But he lived in the light of the eternal verities. His religion was the religion of humanity. To many halt, lame, and blind met in his path, he was a good Samaritan.

On behalf of the court Mr. Chief Justice WINSLOW responded:

EPHRAIM MARINER was one of the last survivors of a generation of lawyers which has now passed from the stage of action. Generally speaking, they were gentlemen of ability, integrity, and usefulness; men who adorned the profession of the law and were leaders in their communities in the various activities which make for the welfare of the citizen, the community, and the state.

When I first became acquainted with Mr. MARINER he was one of the eminent practitioners in Milwaukee, the head of the firm of Mariner, Smith & Ordway, a firm which for many years stood very high in the profession of the state and commanded a large business. As a lawyer of unusual strength and grasp, a man learned and able, especially in the domain of commercial law, whose advice upon a difficult or involved legal question was much to be desired, his place in the front rank was never in doubt. His career was long, successful, and honorable. He laid down his burdens in the evening of life's day after his many tasks were done. The eulogy pronounced upon him in the bar memorial is fitting and well deserved. The bench takes pleasure in adding the seal of its approval to the sentiments which are there so well expressed.

THOMAS W. SPENCE.

Mr. Frank M. Hoyt of Milwaukee then said:

May it please the Court:—On the 24th day of February of this year Mr. THOMAS W. SPENCE, one of the best known members of the bar, while engaged in the argument of a case before this court, displaying his usual vigor and mental alertness, to all appearances in perfect health, was suddenly stricken down and breathed his last almost before those a few feet away could reach him. The shock thus occasioned was accentuated by the fact that although approaching the threshold of old age, he was a young man in appearance and temperament, and so alive in every sense of the word that it was difficult to believe that Death had touched him.

Mr. SPENCE was born in Dungannan, Ireland, in 1846. The family came to America in 1848, settling in Ohio. He received his early education in the public schools of that state, entered the Ohio Wesleyan College in 1867, and graduated therefrom as the valedictorian of his class in 1870. Shortly thereafter he went to Fond du Lac, Wisconsin, where he studied law. He was admitted to the bar in 1872 and practiced in Fond du Lac until 1884 as a member, first, of the firm of Coleman & Spence, and subsequently of Spence & Hiner. He then went to Racine and formed a copartnership with the late Judge Quarles under the name of Quarles & Spence. They moved to Milwaukee in 1888. Shortly thereafter the late Mr. Charles Quarles was admitted to the firm, its name being changed to Quarles, Spence & Quarles.

The firm almost immediately became and thereafter continued to be one of the leading law firms in the state. Judge Quarles as a trial lawyer, cross-examiner, and advocate was not excelled. Mr. Charles Quarles, deeply learned, with phenomenal powers of reasoning and analysis, was one of the greatest lawyers this state has known. Mr. SPENCE combined with his legal skill greater business acumen and greater facility in handling men than either of his associates. All three were not only of the highest personal character, but lovable men, and these qualities earned them the affection of the members of the bench and bar as fully as their abilities inspired respect.

Judge Quarles retired from the firm on his election as United States senator in 1899. Mr. Charles Quarles died in 1908. Mr. SPENCE with his own son and those of Judge Quarles continued the business under the firm name until his death.

As a lawyer Mr. SPENCE was peculiarly gifted. He not only possessed a thorough knowledge of the principles of the law, but he united therewith such good judgment and such sterling common sense that his services were most valuable to his clients. Skilful

and successful in the trial of cases, meeting the emergencies which arise therein with resourceful ability, he was without a superior and with few, if any, equals at the bar in negotiating settlements of litigation. He thereby obtained results more satisfactory than those following successful lawsuits. While he protected to the utmost the interests of his clients, he did not seek for them unfair advantages. His engaging manners and ability to avoid friction resulted in adjustments which secured in all reasonable respects his clients' rights, saving them from the annoyance and expense of trials, and at the same time left their opponents without any bitterness of feeling or sense of being wronged.

He was a very public-spirited man and took a keen interest and an active part in matters affecting the public welfare and always along right lines. Underneath his desire to be on good terms with all men there was a stern sense of duty, and no personal advantage which he could gain moved him to depart from right action. His intimate friends observed this quality in him in one remarkable instance where he knowingly sacrificed the patronage of a client who brought him a large amount of lucrative business, when in a public matter, in which his personal interests were no way involved, he openly and vigorously opposed the action of the client because he believed it contrary to the general welfare.

He earned the warm affection of his friends by his loyalty to them. If he could render service to any of them, the effort was made ungrudgingly and apparently without thought of the time and labor it cost him. That which especially endeared him to us all was his fund of good nature, answering all drafts upon it; his quaint and delicious humor; his unfailing kindliness.

The world loses a sunny presence in his death, and to those of us who were among his close friends it will be for a long time difficult to remember that we are not in our gatherings to be welcomed by his cheery presence and kindly words; that he lives only in our memories and in our hearts.

This is particularly true of us who are facing the twilight of our lives. Between the members of this court and those of us at the bar who have passed long years of service in our profession there has grown up a feeling of brotherly affection, and when one of our number passes away and we meet to pay our tributes to his memory, we do so with a sense of keen personal loss, knowing that from the narrowing list of the friends to whom we cling another has been taken. Today that feeling is especially acute. It hurts us all to think that there is lost to us forever the companionship of kind-hearted, lovable TOM SPENCE.

Mr. Guy D. Goff of Milwaukee spoke as follows:

I would be false to my best impulses if I failed to bring my tribute and lay it upon the grave of THOMAS W. SPENCE. He was

my friend in the sincerest sense of the word, and he was a friend worth having. Death always preaches an impressive sermon, and feelingly teaches us what shadows we are and what shadows we pursue. We often hear the respect paid the dead disparaged and undervalued. It is called a poor substitute for the just treatment of the living. To me it is most laudable, embodying as it does the best sentiments and the truest judgments of mankind. Men see clearly and feel rightly at the grave as nowhere else. Here clouds and mists disappear and prejudices are carried away.

The warm red blood of Ireland flowing and commingling with the life currents of other people has in all history produced men to stir with quickening speech,—to thrill with ecstatic song,—to die with superb daring,—to live in truth for their loves and in faith for their friends, and, with it all, to wear a sun smile in their souls that carries warmth and cheer wherever it beams. And this was the blood from which THOMAS W. SPENCE sprang, and right eminently did he illustrate its noblest traits. He was not a man of expediency, substituting tact for courage, nor did his affection for friends find its origin in dependence. It was the impulse rather of a heart as gentle as it was brave, as considerate as it was fearless and true. And his cordial manner and winning smile gained for him the confidence and esteem of all who knew him. It is not the length of man's friendship that gives it value, but rather the lifelong impression it makes and the good that comes from it.

THOMAS W. SPENCE possessed to a marked degree the qualities of the successful man and the great lawyer. He had excellent common sense. He was decidedly and conspicuously practical. He saw things as they were, in their true and real light. He believed in what was just. He loved what was right, and he moved in straight lines from point to point. His was not a negative character, and with his strong and aggressive nature it was inevitable that the frictions of professional life should provoke some resentments. But in the most eager contests he was always frank and open and never descended to vindictiveness, so often the weapon of the perfidious and the insincere. He was definite in his purposes. He set himself to do specific work in every relation of life and he nobly accomplished his end. Advancing years invited him to comforting repose. He had family, fortune, and friends. He could well have claimed that he had earned a respite; but he loved work, and the habits of a lifetime always called him on. He possessed a splendid legal mind, and was of a brilliant and intellectual period of the bar—a period which has left an enduring influence on the history of this state. Death claimed him when he seemed best fitted for higher achievements. He died in the harness, in the midst of his fame and success, actively participating in the struggle,—where the battle was strong and the race swift. To us who remain, occasions such as this

may well seem like admonitions. Today our brother sleeps. It is we who speak. Tomorrow our lips may be silent and other voices speak as we are doing now. In the lottery of death there are no blanks. The dread moments are sure to come, when the happiness of a lifetime melts away in one sad hour. Yesterday it was the child just unfolding into the beautiful mysteries of life; today it is the middle-aged just ready to reap a harvest of unremitting toil; tomorrow it is the aged, full of years and honors, whose light, burned to the socket in a well-rounded life, goes out in darkness. And as we reflect upon the perplexing riddle of life, we are disturbed by the fact that everything is fragmentary and nothing is perfected.

"Whether we shall see him face to face in that undiscovered country; whether we shall know him there, as we knew him here; whether body and soul separate here to be united again 'over there;' whether that other life is a commingling of kindred spirits while the body returns to dust; whether it is all of life to live and all of death to die, are problems we cannot solve."

But this we know, that another earnest, active intellect is stilled and the task of another toiling life ended; that just as he hearkened here in the Temple of Justice to the call of Duty, "God's finger touched him, and he slept;" beckoned him away from all the splendid, majestic beauties of life, from love and care and sorrow, to awake in eternity free from grief and pain.

His record is made up, his fame safe without praise of panegyric. Peace to his ashes! for of him it may with truth be said that throughout his long career he bore without reproach the honored name of gentleman.

Mr. W. A. Hayes of Milwaukee then said:

May it please the Court:—It has been said that no man ought to count his life's work a success, or to consider it completed, unless he has at some time and in some way given hope and encouragement to those of a younger generation. And I come here today as a witness to the fact that, measured by this standard, the life of THOMAS W. SPENCE was a success. I come not to speak of his acumen as a man of affairs, nor his skill and abilities as a lawyer, but simply and briefly to mention the signs of his true inward worth.

When I was a very little barefooted boy Mr. SPENCE came to my father's farm and took dinner with the family. He held me by the hand, patted me upon the head, and otherwise pleased my childlike nature. Mr. SPENCE was then practicing law at Fond du Lac, and such calls by city folks upon people living on a farm at a considerable distance in the country were rare. The occasion made a most deep and lasting impression upon me, and though I many times thought of him, and though he was subsequently my father's counsel in some small matters, I do not remember to have seen him again

until I was grown and went to Milwaukee, there to locate for the practice of the law.

When I went to Milwaukee I had neither money nor clients nor friends. The struggle was hard and the outlook ofttimes very discouraging, but Mr. SPENCE, whom I frequently met, seemed always to take an interest in me. He was ever kind, and never failed to give the needed encouragement. Few knew of our acquaintanceship, and, if he spoke of it as little as I did, the reason may be readily understood. His friendship was to me one of those very personal and almost sacred things not generally to be made known. One evening, a few weeks before his death, we met by chance in the city of Washington and spent together a couple of most pleasant hours. We both spoke of soon meeting again, but he answered the mystic call, passed into the shadows, and one whom I had learned to love, now mingles with men no more.

"We know not fully what we are,
Still less what we might be,"

and how much the life of Mr. SPENCE has influenced mine, I do not and cannot know. But this much may be said, he was the first lawyer I ever saw, and some time after the visit to our house of which I have spoken, my father having asked me what I wished to become when I grew up, I promptly answered, "A lawyer." I can trace the idea to nothing but the visit of Mr. SPENCE.

"For half our being lies in trance
Nor joy nor sorrow brings,
Unless the hand of circumstance
Can touch the latent strings."

And if it be that the idea of becoming a lawyer got into my boyish head because of that early meeting with Mr. SPENCE, then it is true that I am here because he was there, and it is also true that he is here today.

The innate gentility of his nature, his unfailing courtesy, his unaffected kindness, and his consideration for the welfare and feelings of others leave with those who knew him best the sweet remembrance of a friend. He lived and died a gentleman, the world's indispensable type of man.

Mr. Justice MARSHALL, on behalf of the court, responded as follows:

The memorial and eloquent tributes meet a most harmoniously responsive chord here which I am directed to evidence for the court,—a duty which the heart so embraces as to unavoidably give color to performance. That much, perhaps, was expected from the circumstance of long acquaintanceship with Mr. SPENCE, of warm personal

regard for him and the shock of the distressing end which lapse of time has not repaired.

It was a tragedy in the suddenness of it, the occasion of it, the environment of it. We now see the genial, smiling, courteous, vigorous, able, most lovable manly man, and esteemed member of our bar, in waiting to afford valuable aid in the solution of intricate pending legal questions,—upon the point of presenting reasons for conclusions in his client's behalf; every lineament of his countenance disclosing confidence of conviction from that investigation and experience which we had become accustomed to find most helpful in cases in which he was interested; then, quickly, well nigh as the change of human vision:

"How pale appeared
Those claycold cheeks where grace and vigor glowed;
O dismal spectacle! How humble now
Lies that ambition which was late so proud!"

The soul of THOMAS W. SPENCE had fled. Only the earthy tenement was left in our presence. The enemy which lies in ambush, concealed in general and in this instance beyond the remotest thought of presence, had made the attack which must come for all and won the battle without show of resistance. No herald was sent to warn—no delay permitted. The instant the blow was struck the deed was done—all was finished. How it points the lines:

"We know when moons shall wane,
When summer birds from far shall cross the sea,
When autumn's hue shall tinge the golden grain,
But who shall teach us when to look for thee—
O messenger of death!"

How such occasions, moreover the particular one, challenge attention to the solemn realization of the inevitable change, named "death;" but, which we so much hope to be a release of the soul from its temporary abode to live on without end in a different sphere and higher type of existence—hope, without knowing, springing from the intuitive faith that it must be so, because it ought to be so. Must it not be that the unsolvable uncertainties of human aims—the unavoidable end of one's ambition; the lapse of that which gropes continually like a shadow in earthly gloom for some demonstrating light upon futurity, and without satisfaction, has beyond a succession giving greater point to that which is visible than the mere accomplishments "'twixt the cradle and the grave." It seems so, and yet the mere seeming must satisfy the longings of the soul for something beyond the reach of human knowledge. With the buoying hope of immortality, which smoothes the pillow of the passing and binds up the wounded hearts of the left behind of family, of friends,

and those in the broader brotherhood of vocational circles, we confidently assert, as if it were truth infallible:

"Let earth dissolve, yon ponderous orb descend
And grind us into dust; the soul is safe;
The man emerges, mounts above the wreck
As towering flames from nature's funeral pyre."

We turn from the exultation of optimism to express, in brief, our conception of the subject of these proceedings. It is appropriate to thus make a record here which shall significantly preserve the estimate of him by bench and bar on the files of this court and in the published history of its work so long as time shall last. There is greater significance therein than mere evidence of remembrance of and respect for an able assistant in legal administration. There is greater dignity in it than in a stately granite column challenging attention to departed eminence. There is a force and warmth and enduring influence about it which will give stimulus to the unfolding and development of character of those to whom the future will afford opportunity for distinction in the direction of the ideal of human capacity for worthy attainment.

Behind the veil through which can be seen, but imperfectly, the domestic life, one need not attempt to penetrate, though the influences there and which go out from there largely shape life in the open. Through the latter can be seen the former with a minimum of danger of misconception. In the particular instance, that there was a domestic bliss whose constant sunshine nourished and sustained the geniality which so distinguished Mr. SPENCE in all other relations of life, we may safely conclude. More need not be said.

Turning to where man meets man in the absorbing activities of life, where can we go, to whom can we point for an example in higher degree of those elements of heart and soul and intellect, of courtesy, cheerfulness and charity, of integrity in private and professional relations, and in winning personality than the one possessed of whom we speak? If anywhere, I do not appreciate it. He had a love of truth, which ambition for success in the strenuous contests of his profession never caused him to violate. He was distinguished for frankness toward and likewise charity for others. He was conservative in a high degree without a taint of want of courage. No blind zeal for success made him sacrifice his professional ideals, particularly, as to respectful treatment of opposing counsel, the court, and the great purpose of professional life to aid in the discovery and effectuation of truth. No storm of passion unbalanced him. His course was always directly, logically, respectfully, but confidently onward to an objective conceived to be the right of the matter in controversy. What a blending of elements requisite to the evenly balanced character,—an example to those who survive and those who will soon take their places! In the eminence

attained, what an object lesson of that which one can be without aid of inherited fortune or advantage of birth or environment,—just by industry, integrity, and cultivation of the manly graces. No abnormal element, had he, which may characterize the genius who, because of the particular talent, may be great by nature or because of service to his fellowmen and be so infirm, in general, or some particular, as to leave upon the pages of history that picture: "The world recognized the great intellect and marveled at its power. It appreciated his great acquirements and honored him, but it could not love him." He whom we now commemorate possessed the well balanced character of true greatness which every one admires and every one loves as well.

It seems, we need not say more in response; yet we hesitate to close; there is so much, in general, which might be said, moreover, veiled in the background, are whisperings, gentle and persistent as the music of the leaves, touched by soft zephyrs of the summer night, seeking expression.

As seen from here the career of Mr. SPENCE was finished at the zenith of his laudable ambition and without a blemish upon it. Though dead, in the physical sense, yet he speaks out to us with powerful influence in conception of an existence beyond all earthly things—liveth in an invisible presence which appeals to our senses, heightens our pleasure of remembrance, and stimulates our courage in the performance of life's many duties.

In contemplation of the past, beautiful unpaintable pictures appear in the mind which bear one, for the moment, resistlessly away from the impersonal as the receding billows of the deep do their burden after breaking upon the shore. O, life does seem so much "sweeter that he lived." Great heart which so much possessed us and which we in return so much possessed—cementing the ties of friendship firmer and firmer to the end of the years which witnessed the sudden passing—a friendship which so gave added brightness to life when the sky was cloudless and reached out so effectively to dispel gloom with the sunshine of hope and confidence when the storms were on or seemed most threatening. Priceless treasure among things possessed in life and retained in memory in death, it will abide with me to the end to strengthen, to cheer, and to give hope that some time somewhere beyond the shadows we shall meet again.

Thus the restraints of position and occasion may, I trust, permit the personal pictograph of affection to be flashed upon the screen beside the character picture in official and professional conception—the tribute from the former angle adding to that from the latter—the one furnishing a fringe of sunshine for the other as the glistening setting of purest gold surrounds and holds the sparkling gem; the harmony of the two lending beauty to each. There let them speak out from the record we now make—mutely teaching their les-

son which shall endure in the history of this court beyond the life of any physical monument. Winter's snows and springtime's flowers, summer's sunshine and autumn's decay with its blending of gloom and brightness, may succeed each other over the physical resting place of the noble character till the spot itself shall have been forgotten except to the passer-by who may presently read it cut in stone; even the marble or granite fall into decay, yet that here will continue to teach its valuable lesson and the gentle spirit of him we so much admired and loved will continue to influentially reach out from the unseen world beyond the impenetrable veil 'twixt the finite and infinite to guard and to guide those in being and those who shall come after to the remotest succession.

Thus we may challenge the inexorable reaper with that vanquishing pean worthy to have been penned by celestial hands:

"Oh death! where is thy sting?
Oh grave! where is thy victory?"

emphasizing those beautiful lines before spoken:

"The soul is safe;
The man emerges, mounts above the wreck
As towering flames from nature's funeral pyre."

So triumphantly we finish the record as we order these proceedings to be placed on file and printed in the official history of the court.

WARREN DOWNS TARRANT.

On the 11th day of October, 1912, Mr. Walter D. Corrigan of Milwaukee addressed the court as follows:

May it please the Court:—The Milwaukee Bar Association presents its memorial of the late Judge WARREN DOWNS TARRANT, and I wish to move that it be spread on the records of this court.

Memorial of the Milwaukee Bar Association.

Judge WARREN DOWNS TARRANT was born at Durand, Wisconsin, December 10, 1867. His father, George Tarrant, came from England in his early youth, and his mother, *née* Clara L. Runey, was born in Maryland, the descendant of a long line of patriots.

Graduating from the high school of that city in 1885, Judge TARRANT entered the University of Wisconsin and completed his collegiate and law courses in 1892. He at once entered the practice of law in Milwaukee, with Theodore Kronshage, the firm being known as Tarrant & Kronshage. In 1897 Francis E. McGovern, now governor of Wisconsin, joined the firm. Five years later Judge TARRANT was appointed by Governor La Follette to the circuit court bench of Milwaukee county, to fill the vacancy caused by the death of Hon.

EUGENE S. ELLIOTT, at that time being the youngest man who ever occupied the bench of the Milwaukee circuit court. The same year he was elected as a nonpartisan to fill the unexpired term of Judge ELLIOTT. He was re-elected without opposition.

During his incumbency on the bench he served also as special lecturer of the law departments of Marquette University and of the University of Wisconsin. He was a member of the Knights of Pythias and of high rank in the Masonic order. He was a member of the American Political Science Association and of the Milwaukee and Wisconsin Bar Associations, and enjoyed a life membership in the State Historical Society of Wisconsin.

After a brave but hopeless three weeks' struggle against invading disease Judge TARRANT died on the 14th day of May, 1912. No event in many years in this commonwealth has been received with such genuine and universal grief. The companions of his younger days, college mates, and acquaintances of his university life, and the legion of friends and associates of his mature career, were alike stricken and inconsolable.

In a brief span of forty-five years he had crowded the events and accomplishments of a full and rich life. He possessed one of those winning and charming, strong personalities which impressed itself indelibly upon all with whom he came in contact, whether in the lighter activities of social or friendly intercourse, or whether in the material or serious life of business and the law. Not many acquaintances in the life of any of us get to occupy so firm a place within our hearts as to make us feel in their passing that the loss is irreparable; but in the death of Judge TARRANT we do not overspeak the fact when we say that he had so woven himself into the enduring affections of a legion of friends that the years which lie before will give them back no compensation for the loss sustained.

In his person were embodied those fine and strong attributes and qualities which make up the big men of our race. He was gifted with rugged common sense, with native homely honesty, a clear, sure, and discriminating mind; direct and sensitive sympathies. In him there was no guile or artifice, no indirection. In the larger and in the smaller things of life, his habits of thought and conduct were true, frank, and sincere. Ideally trained for his high calling upon the bench, he had acquired an unusual fulness of knowledge, which, conjoined with the natural qualities to which we have referred, ripened into a mature wisdom and made of him at once an honest and learned judge. As a lawyer he was painstaking, keenly ethical, and conscientious. As a judge he maintained the same high ideals which marked his conduct in active practice. Whether in his relations to the newsboy who sold him a paper; the laborer whom he had occasion to employ; the young lawyer appearing for the first time in his court; or to the high and distinguished officials of state or na-

tion, his conduct was always characterized by a democratic dignity which enabled him to mix in the current affairs of men and yet preserve a supreme and almost native dignity when presiding in his court.

It is rare that one who has risen to position of responsibility and eminence has that supreme sense of fitness which enables him in the privacy of his chamber to visit over matters of intimate and confidential relations in his personal or social or business affairs, and a few moments after, sitting upon the bench, to create, by the very force of character within him, the conscious sense that that same person with whom he visited can expect nothing but simple and exact justice. Yet this was true of Judge TARRANT. He was firm or gentle as the occasion required. Many who met him only infrequently and casually were impressed with his cheerful and happy and kindly companionship. Those who knew him better were impressed with the depth of his understanding of things and the bigness of his intellect, the strength of his character, and the firmness of his convictions. Those who knew him most intimately knew of his courage to sacrifice. Scarcely any one who ever came in contact with him but knows of or remembers some incident in which a kindly word of encouragement was spoken to them, a thoughtful act of assistance rendered, and words of counsel and grave advice, or acts of unselfish devotion and abnegation rendered without stint and without reckoning. This conduct was the broad and natural expression of his generosity, freely extended without any selfish purpose upon his part that compensation might follow kindness, or that the years that laid before would bring back bread cast upon the waters.

While his death caused quick grief and the pained sense of personal loss at once, that loss and its significance in the lives of those who knew him well will be deeper as the years advance.

At such times as this, the only light that breaks through the lowering clouds is the consolation of religion. This is the comfort of trusting faith; but why a life full of promise, when one in the very full tide of life, engaged in useful service to human kind, his mind a rich storehouse of knowledge, his character clean and lofty, his potentiality for service ever rising to greater usefulness,—a man and a judge withal whose influence was an uplifting force under every institution of our state and common country, should be stricken down, is beyond the understanding of finite wisdom. It is at such a time that human reason rises up in rebellion to challenge trusting faith.

We only know that religion teaches us that those whose days are spent in clean living and virtuous achievement have promise of rich compensation in the Eternal Life that lies beyond. Let us hope and pray that when the encircling gloom settled over his mortal spirit, a kindly light did lead him on, and as his soul departed from

these mortal shores there broke upon his vision the light of the eternal morning.

Mr. Corrigan continued:

May it please the Court:—In moving that the memorial resolution just read be spread upon the minutes of this court, we all know that reasons abound in every mind for doing everything possible to testify our love and admiration for Judge TARRANT. Beyond the mysterious chasm between life and death, we trust that he may know that his work has the approval of our hearts.

The death of any such man is appalling. We find it difficult, if not impossible, to square such a loss with reason. However much we depend on faith to antidote our anguish, we know his death makes a tremendous difference with his community and his state. Faith is not perfect or profound if blind to this.

We have paid our tributes, but we can never be half done with them. It is the fortune of few men to have been so highly regarded. Lawyers, old and young, our citizenship generally, were overwhelmed by his death, and profoundly mourn for themselves, for the community, and for those bound by the ties of relationship. Most beautiful and just tributes have been paid to him, such as come from the heart when deeply moved. His funeral train was a mark of love and respect from the Milwaukee bar surpassing any other instance of tribute that I know of in the history of Wisconsin. With more than half a hundred of our membership present,—three hundred miles away from our homes,—we witnessed and participated in the funeral ceremonies at his boyhood house and home. We saw him laid to rest there, on a beautiful, smiling hillside. We turned away with tear-stained faces because we had to leave him there to sleep the years of his manhood away, hoping for that immortality so well expressed by Prentiss:

"It cannot be that earth is man's only abiding place. It cannot be that our life is a mere bubble, cast up by the ocean of eternity, to float another moment upon its surface, and then sink into nothingness and darkness forever. Else why these high and glorious aspirations which leap like angels from the temples of our hearts, forever wandering abroad unsatisfied? Why is it that the rainbow and the cloud come over us with a beauty that is not of earth, then pass off, leaving us to muse on their faded loveliness? Why is it that the stars which hold their festivals around the midnight throne are set above the grasp of our limited faculties, forever mocking us with their unapproachable glory? Why is it that the bright forms of human beauty are presented to our view, then taken from us, leaving the thousand streams of our affections to flow back in Alpine torrents upon our hearts?

"We are born for a higher destiny than that of earth. There is a realm where the rainbow never fades; where the stars will be

spread out before us like the islands slumbering in the ocean; and where the beautiful beings that here pass before us like visions, will stay forever in our presence."

Judge F. C. ESCHWEILER of Milwaukee then said:

The judges of the circuit court for Milwaukee county, all being present before this honorable court, wish to add a few words to the tribute that is being made on this occasion in honor of Judge WARREN D. TARRANT.

He left us, young in years, rich in wisdom, still richer in the then bright promise for his future, firmly rooted in the affections of his countless friends.

His vigorous outward personality but portrayed his strong and truly masculine mind.

Self-reliant he was, yet ever ready to take and to give counsel.

He had no parade ground for his feelings, but we, who knew him so intimately, know of his sincere faith in his fellowmen and in the Higher Power to whom he acknowledged allegiance.

Ever cordial and courteous as he was to his friends, he was particularly so to his associates, and it is hard to realize that his pleasant smile must now be but a memory and that his genial handclasp is for us no more.

His ardent devotion to his ideal of the responsibilities of the duties of his office is perhaps no better exemplified than in what took place a short time before his death. During the winter months he had an attack of the same trouble from a recurrence of which he died, and after recovering and returning to his work he was urged to submit to an operation. It was but the feeling that it would mean several weeks' or months' interruption in his ever-pressing work that made him determined to wait until the coming summer, when he felt he could submit to such a remedy. That summer never came to him and that delay meant his death.

We followed his body in its mournful journey, from our home, which he had made to love him so well, to his boyhood home he had loved so well, far across our great state, and there he was laid to sleep on the pleasant hillside near the village where his widowed mother, who, like the Spartan mother of centuries ago sent her son forth with his shield, now knows that her son has come back to her with, and upon, his untarnished shield. Then we said, as we now say at this last public opportunity, Farewell, farewell!

J. C. LUDWIG.
O. T. WILLIAMS.
LAWRENCE W. HALSEY.
W. J. TURNER.
F. C. ESCHWEILER.
OSCAR M. FRITZ.

Judge W. J. TURNER of Milwaukee also spoke briefly, but no record of his remarks has been preserved.

On behalf of the court Mr. Justice SIEBECKER responded:

The affectionate tributes of his friends, his neighbors, and his professional brethren very properly recognize that Judge TARRANT was a man of unusual endowments and that his life was rich in attainments and fruitful achievements, the rewards of a steadfast adherence to high ideals and a firm devotion to the service of his fellowmen. Cut down in early manhood in the midst of his career, his sudden taking off has brought sorrow to many hearts and a deep sense of the loss that has befallen the people in being deprived of the splendid promises of his services as a citizen of the state. Though my personal intercourse with him was limited, I learned to know him as a man rich in talents and of accomplished mind. He was a forceful character, and he had rare genial social qualities which left a deep and lasting impression of a charming personality enriched by training and liberal culture. He loved men, had a broad and sympathetic humanity, was keenly interested in the problems of government and society, and was active in furthering movements for their betterment. Strength was his dominant characteristic; he was strong in body and mind, firm of will and character, and earnest in the manner and method of performing his allotted tasks in life.

He devoted his native endowments with diligence to gaining proficiency in his chosen profession of the law, wherein in a short career he gained marked distinction. All who knew him recognized with what clear perception he comprehended the principles of law and with what rare facility he applied them to the ever-varying and complex affairs of life. His legal scholarship was marked by thoroughness and a familiarity with the rules and principles of the common law and equity jurisprudence. He thought deeply and accurately, and by industry and perseverance gained a mastery of the subjects he investigated. At the bar he exhibited painstaking preparation of his cases, and he presented them with a practical directness, going to the heart of the subject in controversy, which commanded the respect of court and jury.

Add to these attributes a love of justice and a pervasive integrity and we have the mainsprings of his personality, that made him the pure, independent, and high-minded judge, whom the people loved and esteemed for his manly qualities and for his superior abilities for administering the law in their courts of justice. Judge TARRANT was public-spirited and responsive to the needs of the people. As a citizen he was patriotic and he loved his country. He believed in a government that is representative of its people and which with

even-handed justice operates through laws to supply human needs. He believed that government should be adapted to the exigencies incident to the ever-changing economic, social, and governmental conditions. This made him a student of contemporary events and social progress. It led him to a close scrutiny of established customs and precedents and made him averse to following them unless the light of reason and enlightened conscience approved them as the true guides along the path of humanity to the attainment of equal justice. These sentiments were coupled with a rare good sense that saved him from errors of false notions and mere theory. In the discharge of his judicial labors his course was characterized by that directness and simplicity which raised him to the high plane where he was left free to pursue the solution of controversies free from passion, prejudice, and bias. In judicial manner he was the courteous, earnest, and fearless expositor of the law, and his devotion to the performance of his duties met the ideals of a high calling. He knew neither friend nor foe, the high nor low, the weak nor strong, and strove ever to maintain an even balance in the contests between man and man.

A view of the events of his life shows us that his intents and motives were illuminated by a purpose to serve others, to help them bear their burdens, and to promote honesty and right-doing among men. To accomplish these ends he pledged his energies and his talents, in the faith that a duty conscientiously performed fulfils our most sacred obligations and attains the highest reward accorded to man for service to his fellowman.

No more will the people of this state have the intelligent leadership of his high talents and devoted service, but the spirit of his life will be potent to help sustain the noblest institutions of our state. No more will friends and acquaintances meet the genial, social man, of broad sympathies and generous friendship, but they will ever cherish the memory of his cheerful presence and cordial companionship. We shall all remember him and continue in mingled regret and admiration to recall his strong and active attributes of mind, the splendid qualities of his heart, and the solid strength and independence of his manhood.

Though cut down in the prime of his powers, his achievements impress us with the truth: "That life is long which answers life's great end," and though he no longer dwells among the living, the fruit of his labor, the meaning of his noble life, and the light of his exemplary character abide as a noble bequest to his kinsmen, his friends, and to the state.

CASES DETERMINED

AT THE

January Term, 1912.

BROSSARD, by guardian *ad litem*, Respondent, vs. MORGAN COMPANY, Appellant.

April 25—May 14, 1912.

Master and servant: Negligence: Injury from defective appliances. Breaking of drive-belt: Proximate cause: Reasonable anticipation of injury: Evidence: Questions for jury: Special verdict: Fellow-servants: Making of repairs: Damages: Appeal: Review.

1. Proof that a drive-belt, used to operate a wood-working machine near which plaintiff worked in defendant's factory, was made of several pieces spliced together and fastened with glue, that it was old and had parted several times, and that after separating at one of the splices and being repaired it separated again at the same place about two hours after starting up, is *held* sufficient to sustain a finding of negligence in furnishing defective appliances.
2. *It seems* that every sane man is bound to anticipate that the breaking of a defective belt driven at a high rate of speed and subject to great strain may result in injury to a person at work near such belt; but in any event the proof in this case that the superintendent of defendant's factory knew of the probability of such injury was sufficient to charge the defendant with such knowledge.
3. If the fact of reasonable anticipation of injury, as an element of proximate cause, is established as a matter of law, error in submitting the question to the jury is harmless if the jury answer it correctly.

4. Where the facts are undisputed and no conflicting inferences therefrom can reasonably be drawn, the question of proximate cause becomes one of law.
5. The jury having found in this case that defendant was negligent in furnishing a defective drive-belt, the undisputed evidence is *held* to establish the further fact that such negligence was the proximate cause of the injury to plaintiff, who, when the belt broke, was struck thereby and lost an eye.
6. Technically, findings by the jury that defendant negligently failed to equip the machine with a reasonably safe drive-belt or with a suitable drive-belt shifting device, and negligently failed to warn plaintiff of the danger to which he was exposed while working at the machine equipped as it was, included a finding that defendant had reasonable ground to anticipate an injury to some one by reason of the defects.
7. In an action for personal injuries caused by the breaking of a drive-belt, evidence that the belt had broken on previous occasions and that persons had been injured thereby was competent, the former to show the belt defective, the latter to charge the master with knowledge of the danger therefrom.
8. Although the jury found that there was no negligence in failing to guard the belt which broke, so that the defense of assumption of risk was open to defendant, there was no error in failing to submit a separate question on that subject, none being asked by defendant; and on appeal that question will be deemed to have been included in and covered by the question relating to contributory negligence.
9. The fact that a drive-belt which broke and injured plaintiff had shortly before been repaired by another employee of the defendant, who was regularly charged with the duty of making repairs, and put back in its place in a defective condition, would not relieve defendant from liability, either under the fellow-servant rule or on the ground that the act of repairing the belt was an ordinary step in the progress of the work in which plaintiff with others was engaged.
10. Where plaintiff's injuries consisted of a scalp wound, involving a surgical operation and loss of one eye with some impairment of vision in the remaining eye, headache, and dizziness, and the ordinary loss of capacity, disfigurement, etc., resulting from the loss of an eye, an award of $6,000 is *held*, though large, not so excessive as to call for reversal or modification on appeal.
11. Where, as in actions for personal injuries, the damages are unliquidated and cannot be determined by rule, the jury and trial

judge are responsible for a proper assessment thereof and cannot shift that responsibility. In ordinary cases the supreme court will not interfere with the assessment, but in a case of gross and manifest abuse, where the amount awarded by the jury indicates passion or prejudice and the trial judge has failed to act properly, will exercise its revisory power and reduce the award by granting a new trial conditionally, as the trial judge should have done.

APPEAL from a judgment of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

In this case there was a special verdict as follows:

"(1) Was the plaintiff injured at the time alleged by the breaking of the drive-belt on the sticker at which he was set to work? *A.* (by the court). Yes.

"(2) Did the defendant at the time the plaintiff was injured negligently fail to equip said sticker with a reasonably safe drive-belt? *A.* Yes.

"(3) Did defendant at the time plaintiff was injured negligently fail to equip said sticker with a suitable and proper drive-belt shifting device? *A.* Yes.

"(4) Did the defendant negligently fail to warn and instruct the plaintiff as to the danger to which he was liable while doing the work at said machine equipped as it was? *A.* Yes.

"(5) Did the defendant negligently omit to securely guard or fence said belt? *A.* No.

"(6) If to questions Nos. 2, 3, 4, or 5, or any of them, you answer 'Yes,' then were the facts so found the proximate cause of plaintiff's injury? *A.* Yes.

"(7) Was plaintiff furnished with a place to work as safe and free from danger as other persons of ordinary care, prudence, and caution, engaged in like business and under like circumstances, generally furnished at the time of the injury? *A.* No.

"(8) Was plaintiff injured at the time and place in question as the result of a pure accident? *A.* No.

"(9) Did any want of ordinary care on the part of plaintiff contribute to cause of injury? *A.* No.

"(10) What sum will fairly compensate the plaintiff for the injuries he sustained? *A.* $6,000."

For the appellant there were separate briefs by *Weed & Hollister,* attorneys, and *Charles Barber,* of counsel, and oral argument by *Mr. Barber* and *Mr. H. I. Weed.*

W. B. Rubin, attorney, and *John F. Kluwin,* of counsel, for the respondent.

TIMLIN, J. It is contended by appellant that there is not sufficient evidence to support the answer to the second, third, fourth, or sixth question of the special verdict. The plaintiff was in the employment of defendant, engaged in taking away pieces of lumber that had passed through a machine known as a sticker. He was about seventeen years of age. While thus engaged the belt that drove the machine broke and struck the plaintiff, causing the loss of an eye. This was a leather belt, consisting of sections spliced and fastened together at the splices with glue. There was evidence, not controverted, that this belt came apart or broke a week before and again on the day before the injury to plaintiff. The last break was repaired that evening by again gluing the parted sections together, and it began and ran about two hours the next morning and again broke and caused the injury in question. There was also evidence tending to show that the belt was an old one. In describing the rupture of the belt some of the witnesses said: "It broke where it was glued together." Another: "It broke in a splice. I think it was the same splice. The splice I fixed the night before I think was the splice that parted when *Brossard* was hurt." This was sufficient to convince the jury that the belt separated at the splice from lack of adhesive qualities of the glue or proper drying, or because of the insufficiency of glue fastening, and also entitled the jury to infer that, in replacing the belt in such condition that it parted about two hours after starting up, the defendant furnished a defective appliance. The belt ran with considerable speed and was subject to the usual strain of driving wood-working machinery of this kind, and the position of the plaintiff with

reference to the belt, while engaged in his work, was at times such that a defective belt would be dangerous to him. The second question of the special verdict rests, therefore, on sufficient evidence.

There was no belt-shifting device. By the third question the jury found that the defendant, in failing to so equip the machine, was negligent. By the fourth question the jury found that there was negligence in failing to warn and instruct the plaintiff. It is unnecessary to discuss the evidence with reference to the two questions last mentioned. If we assume as most favorable to the defendant that the evidence was insufficient or unsatisfactory with respect to these questions, that would not affect the result. The circuit court instructed the jury that if they should find the defendant was guilty of negligence under questions 2, 3, 4, and 5 they should then answer the sixth question Yes. In giving this instruction the learned circuit court evidently proceeded upon the theory that there could be, under the evidence and the circumstances mentioned by him, no doubt concerning the proximate cause of the injury. He had before him this situation: On the trial the defendant stated: "We admit that the boy lost his eye by reason of the breaking of the belt." In addition to this the evidence was without dispute that this belt had broken the day before the injury to plaintiff and again a week before such injury. This the superintendent in charge for defendant did not deny, but merely testified that he did not know of any such accident as that of a man getting a black eye or being hit in the leg with a broken belt. He however testified, bearing on that element of proximate causation called anticipation of injury, as follows: "I have heard of belts breaking, have seen belts break. They tear in revolving in the machinery. Strike with considerable force sometimes. The belt might strike in any direction, and if it hit someone it might hurt. . . . If he was struck with a broken belt he would get hurt." It was not necessary to carry this knowledge farther than to the su-

perintendent of the works. It might also, we think, fairly be said that every sane man is bound to anticipate injury to someone from the breaking of a defective belt run at great speed and subject to a severe strain, if it is shown that persons are required to be near that belt while it is in operation. Frank Tech, a witness for the plaintiff, testified that about a week before the injury to plaintiff another man in this mill was hurt by the breaking of a belt. This was denied only inferentially by proof that the superintendent of the mill had not heard of it. The evidence was without dispute that the plaintiff was required by his work to be near this belt and in such position that the belt might strike him if it broke. There is also evidence to the effect that other employees were required to pass in proximity to this belt. The defendant attempted to meet this by the testimony of F. J. Perkins, who had been master mechanic for the Paine Lumber Company for eighteen years, and testified that he never knew of any man getting hurt in their factory by reason of the breaking of a belt either on stile stickers or other machines. . . . He never heard of anybody getting hurt before. He has known of a belt breaking. When it breaks it might fall on the floor and it might go up in the air. If someone was in front of it it might strike him. No belt has broken in his shop and struck any one since 1884. But they never allow a belt to run on the machine that is liable to break or hurt somebody or do any damage. One can tell whether the belt is getting rotten and old. If it broke twice within a week he would fire it. A belt that breaks twice in one week he thinks defective. If a belt breaks within two or three hours after it is put on after gluing, he should say there was something wrong. G. R. Zellmer, superintendent for the defendant, testified that during the eleven years he had been connected with the defendant in that capacity he did not recollect of a single accident to an employee from the breaking of a belt before *Brossard* was hurt.

It will be observed that the actual physical cause of the injury was admitted by defendant upon the record. This left for inquiry only the question whether such actual physical cause was the legal or proximate cause. That may be a question of fact or a question of law, according to whether the evidence bearing on the subject is controverted or uncontroverted. The fact of reasonable anticipation of injury as an element of proximate cause may be established by the evidence, and, if so, any error in submitting it to the jury becomes innocuous if the jury answers the question correctly. *Nelson v. C. & N. W. R. Co.* 130 Wis. 214, 109 N. W. 933; *Davis v. C., M. & St. P. R. Co.* 93 Wis. 47, 67 N. W. 16, 1132; *Wheeler v. Milner,* 137 Wis. 26, 118 N. W. 187. Where the facts are not disputed and no conflicting inferences therefrom can be reasonably drawn, the question of what is the proximate cause of an injury is a question of law. *Allen v. Voje,* 114 Wis. 1, 89 N. W. 924. We fail to see any controverted question of fact in this case relating to the proximate cause of the injury. The actual cause being admitted, the knowledge of the defendant's superintendent that injury might flow from the breaking of a belt, the further fact that this is common knowledge, the proximity of plaintiff to the defective belt, and the fact, established by the verdict, that the belt was defective, are not at all offset by the infrequency of belts breaking in Paine's mill. That may be due to care and diligence on the part of the Paine Lumber Company in not allowing defective belts to be used. No issue of fact arises upon such testimony even if we accept the testimony on the part of the defendant to be true as stated by all defendant's witnesses who testified on this point. Again, the learned circuit judge was, aside from the foregoing, technically correct in his statement that if the jury found the defendant was guilty of negligence under questions 2, 3, 4, and 5 they should answer the sixth question in the affirmative; because they could not find the defendant negligent un-

der these questions 2, 3, 4, and 5, or either of them, without finding that the defendant had reasonable ground to anticipate an injury to someone by reason of the defective belt.

"Mere carelessness is not ground of liability unless a breach of some duty to others and committed under such circumstances as to render injury to the person or rights of another probable." *Compty v. C. H. Starke D. & D. Co.* 129 Wis. 622, 624, 109 N. W. 650.

"If defendant had no reason to anticipate any injury to any healthy person by reason of the atmospheric condition maintained it was not negligent." *Marcott v. M., St. P. & S. S. M. R. Co.* 147 Wis. 216, 219, 133 N. W. 37.

"In order to make out a case of actionable negligence it must appear that the person sought to be charged therewith had knowledge that his act or omission complained of was likely to cause injury to some person or thing. This knowledge may be actual or imputed." *Wickert v. Wis. Cent. R. Co.* 142 Wis. 375, 376, 125 N. W. 943.

"Mere carelessness from which no injury to another can be anticipated is not negligence in the legal sense." *Sparks v. Wis. Cent. R. Co.* 139 Wis. 108, 111, 112, 120 N. W. 858.

"The duty is, not to never fail, but not to fail under such circumstances that a reasonably prudent person might infer injury as a natural and ordinary consequence of such failure, to one to whom the duty is due." *Hasbrouck v. Armour & Co.* 139 Wis. 357, 363, 121 N. W. 157.

"Negligence in law is not mere carelessness, but is careless conduct under such circumstances that an ordinarily prudent person would anticipate some injury to another as a reasonably probable result thereof." *Johanson v. Webster Mfg. Co.* 139 Wis. 181, 184, 120 N. W. 832.

See, also, 29 Cyc. 432, and cases in notes 11, 12, 13, 14 *et seq.*

By their findings of negligence the jury covered this essential quality of the act of negligence. But in the instructions to the jury upon the second, third, fourth, and fifth questions the court did not in every instance specify to the jury this quality of negligence. He did so with reference to the fourth question and with reference to the fifth question. The fourth

was answered favorably to the defendant, but the fifth was answered favorably to the plaintiff. In the instructions on this question the court said:

"On the other hand, it is contended on the part of the defendant that it was not a dangerous place to work and there was no instructions which they could have given him that would have avoided this accident, and that such an accident could not have been reasonably anticipated by them, and therefore they were not guilty of any negligence in failing to instruct or warn him. That is for you to determine from all the evidence," etc.

But we prefer to rest this decision upon the evidence, and, resting it there, we are of the opinion that the undisputed evidence as above set forth sufficiently established that if it is granted or found that defendant was negligent in furnishing a defective belt, then the negligence of the defendant was the proximate cause of plaintiff's injury and that no other cause is shown by or fairly inferable from the evidence. Hence there was no error in the instruction. Chief Justice WINSLOW and Justices MARSHALL and BARNES do not agree with the opinion of the court on this point. We find no prejudicial error in the instructions or in the rulings of the court refusing to set aside the answers of the jury to the questions in the special verdict.

It is argued that the evidence relating to the breaking of the belt on other occasions was incompetent under the rule of *Lind v. Uniform S. & P. Co.* 140 Wis. 183, 120 N. W. 839, and cases there cited. We do not so understand it. The mere fact that other injuries occurred, when that fact has no logical connection with the issue on trial, is of course incompetent, but it would conflict with common sense as well as with law to hold that the defective character of an appliance could not be proven by showing that the same appliance broke or failed under similar circumstances and within a short time prior to the breaking or failure in question. Whether or not any one was injured by such former breaking or failure is

more remote, but still competent on the question of notice to the master of the dangerous character of the defect or insufficiency. The extent and detail of such other injuries is a collateral inquiry which should not be indulged in.

Under this verdict the liability of the defendant is not predicated upon the statute, sec. 1636*j*, Stats. (1898), but upon common law. Because of the negative answer to the fifth question the defendant was entitled to defend on the ground that the plaintiff assumed the risk. This defense is not otherwise covered than by the ninth question. No separate question relating to assumption of risk was requested by the defendant. That subject must therefore be held to have been included in and covered by the ninth question. There was sufficient evidence to support a finding that the plaintiff did not assume the risk. Taking his version he did not know of the former breakings of this belt and knew very little about belts or their construction or sufficiency. There was nothing to put him on inquiry. The defect as to him was latent. There is nothing to show that he knew whether the belt was riveted or glued or laced. There is a fair inference from the testimony that the belt was improperly or insufficiently glued together the night before. We perceive no error on this question of assumption of risk.

It is next contended that assuming the belt, having broken or pulled apart the night before, was improperly glued by another employee of the defendant, that this was the act of a fellow-servant of the plaintiff for which the master is not liable. It is also argued that the act of repairing the belt was an ordinary step in the operation of the mill which the master might intrust to a fellow-servant of the plaintiff. That the plaintiff and the belt repairer were fellow-servants is not borne out by the evidence. Schreiber, the belt repairer, had special charge of that work. The plaintiff had nothing to do with the repair of belts. The fellow-servant rule does not go so far as to relieve the master from liability for negligently

furnishing an unsafe appliance because after the appliance was disabled and out of commission some other servant of the same master, regularly charged with the duty of making repairs, without properly repairing the belt puts it back in its place of operation. It is under such circumstances furnished by the master. This is quite a different situation from one in which a crew of men are operating an appliance, with the duty resting upon any one and all to adjust or repair it in the progress of their work. *Beach v. Bird & W. L. Co.* 135 Wis. 550, 116 N. W. 245, and cases cited.

Considering the evidence most favorable to respondent, his injuries consisted of a scalp wound, the crushing of his right eye, a necessary surgical operation, and loss of the right eye with some impairment of vision in the remaining eye, headache and dizziness, and the ordinary loss of capacity which results from the loss of an eye, and the disfigurement or else the inconvenience of wearing a glass eye. The appellant contends that the damages of $6,000 are excessive and seeks a reversal or a new trial at the hands of this court upon that ground.

This court is engaged in the decision of questions always important and sometimes great, so far as they affect the people of this state. From these decisions follow rules of law for all the people of the state. No matter how imperfectly the work may be done, the work itself is a great work and the duties of the court onerous and the responsibilities heavy. It ought not be and it seldom is required to pass upon questions of fact. It is not consistent either with the duty or dignity of this court to indulge in petty parings of one or two thousand dollars or of small percentages from verdicts in cases of unliquidated damages. It is impossible to proceed by rule in such matters. To some men the value of strong, healthy life, in possession of all members and faculties and free from pain and decrepitude, is much higher than it is to others. Some regard money more highly than others. There is no market value to guide us. Our decisions should be by rule wherever

possible, so as to exclude arbitrariness and caprice. The disregard of rules is neither a good habit nor a good precedent. The law has appointed the jury and the circuit judge to pass on these questions of fact which are incapable of solution by rule. Circuit judges should understand this. They cannot shift that responsibility onto this court, but they themselves must exercise it. For the correctness of such exercise they must answer to that forum to which all public officials must answer for the administration of their offices. In cases of gross and manifest abuse in this respect, where the amount awarded by the jury is indicative of passion or prejudice and the circuit judge has failed to act properly, this court will exercise its undoubted revisory power and reduce the verdict by granting a new trial conditionally, as the circuit judge should have done. But we cannot intermeddle in ordinary cases. This court has declined to interfere with a verdict for $7,000 damages, based upon the loss of an eye, in the case of *Ruck v. Milwaukee B. Co.* 148 Wis. 222, 134 N. W. 914. We would have been better pleased with the result in the instant case had the circuit judge reduced the amount of this recovery by granting a new trial conditionally. But upon the record before us we must presume we have the judgment of the jury and that of the circuit judge that this verdict is not excessive. Under such circumstances we will not interfere with such a verdict. Justices MARSHALL and VINJE do not, however, agree with the court upon this point, but think the recovery in this case should be substantially reduced.

We find no error in the record sufficiently prejudicial to appellant to warrant a reversal.

By the Court.—Judgment affirmed.

STIRN, Respondent, vs. SUPREME LODGE OF THE BOHEMIAN SLAVONIAN BENEVOLENT SOCIETY, Appellant.

April 26—May 14, 1912.

Life insurance: Mutual benefit societies: Amending constitution, etc.: Power to change contract: Consent to change: Payment of assessments.

1. Although the certificate issued by a mutual benefit society to a member provides that he shall comply with all the laws, rules, and regulations of the society, and power to repeal or amend the constitution and by-laws is reserved therein and in the charter, this does not authorize the society by any such amendment or repeal to nullify or materially alter the contract of insurance expressed in the certificate.
2. Thus, where the contract was that the society should pay the wife of the member $1,000 upon his death, but if she died first should pay him $250 upon her death and the balance after his decease to a beneficiary named by him, no amendment to the constitution and by-laws could cut off his right to receive the $250 at the death of his wife, and make the whole sum of $1,000 payable only upon his death.
3. Where the member continues to pay assessments after notice of an amendment to the by-laws purporting to alter his contract, but refuses to surrender his certificate and accept a new one containing such alteration, the payments do not show a consent to the change.

APPEAL from an order of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The material allegations of the complaint are that defendant is a mutual benefit association or fraternal order engaged in the business of insurance on the mutual assessment plan; that November 25, 1891, plaintiff was received by said defendant as a member and it issued to him its certificate for $1,000 bearing said date; that one of the provisions of said certificate read as follows:

"Provided, however, if the wife of said brother *Francis Stirn* shall die previous to his death, and his said wife having

previously passed a medical examination to the satisfaction of this society, the sum of $250 of the said sum of $1,000 shall be paid, upon satisfactory proof of death, to said brother *Francis Stirn,* and said payment shall be indorsed on the back of this certificate or upon the certificate issued in lieu thereof, and after his death only the balance of said $1,000, to wit, the sum of $750, shall be paid on this certificate, or upon any certificate that may be issued in lieu thereof."

That on or about the 6th day of June, 1908, plaintiff's wife, who had previously passed a medical examination to the satisfaction of the society, died, and on the 13th of June, 1908, he gave due notice and delivered proof of death of his said wife to the defendant in conformity with the provisions of his certificate; that he delivered his said certificate to the defendant for the purpose of having paid to himself and indorsed on the back thereof said sum of $250 and to have issued to him in lieu thereof a new certificate in the sum of $750. It is further alleged upon information and belief that since the death of plaintiff's wife the defendant has levied and collected an assessment upon its members to pay the plaintiff's claim of $250 and that it has had and still has in its treasury a sufficient sum to pay his claim and all other just claims against said defendant; that he has requested, and defendant has refused, the payment of said sum of $250, and prays judgment for said amount with interest and costs. The plaintiff demurred to the following portion of the answer:

"Further answering, and by way of defense, said defendant alleges that at the time the plaintiff became a member of the defendant society, he then and there faithfully promised and pledged himself that he will always, while a member of said order, obey and comply with all the rules, regulations, by-laws, and charter of said defendant society.

"That at a convention of said defendant organization held in the city of St. Paul, Minnesota, from June 15 to June 20, 1896, the members of said organization duly amended, altered, and revised its constitution and by-laws, and that said constitution and by-laws as so amended, altered, and revised were in

force at the death of said Bertha Stirn and had been in force for a long time prior thereto. That said constitution and by-laws in force at the time of the death of said Bertha Stirn contained no provision for the payment of any sum or sums of money whatsoever, to a member upon the death of his wife upon or under any certificate issued to such member as alleged in said complaint, but that all provisions for the payment of said sum of $250, as aforesaid, to a member upon the death of his wife were duly repealed and annulled by said convention, and instead the following provisions were made and duly adopted and were in force at the time of the death of said Bertha Stirn, to wit: [setting out provisions]; that plaintiff had full knowledge of the repeal of said provisions above mentioned and the adoption of the new constitution and by-laws, but that he at no time made application for the admission of his wife to a death benefit as therein provided, and that said Bertha Stirn, his wife, utterly failed and neglected to in any manner comply with any of the provisions of said constitution and by-laws so adopted in 1896, aforesaid, in no way has the same provided for the payment of any sum for death benefit or otherwise upon the death of said Bertha Stirn.

"Defendant admits that it levied and collected an assessment upon the members to pay said plaintiff the sum of $250 as the benefit for the death of his wife, but alleges in that behalf that said assessment was so levied and collected by mistake and under a misapprehension of the facts and in the belief that said plaintiff and said Bertha Stirn had fully complied with the provisions of said constitution and by-laws of 1896, aforesaid (providing the manner in which application should be made by a member for the admission of his wife to the death benefit, and that as therein provided said Bertha Stirn, as his wife, has fully complied with said constitution and by-laws), but that said defendant has no power or authority or any legal right to pay said sum so levied and collected to any one, by reason of the death of said Bertha Stirn.

"Defendant further alleges that owing to said mistake and misapprehension of facts, it did issue to said plaintiff a new policy or certificate in lieu of the original certificate in the sum of $750, but that said defendant has no power and did not have such power or legal authority to issue such new certificate, and that upon discovering the error it duly issued a

new certificate in the sum of $1,000 in accordance with its constitution and by-laws, and delivered the same to said plaintiff, but that the said plaintiff has refused to accept the same and that he has returned said certificate. . . .

"That said original certificate in the plaintiff's possession at the time of his said wife's death and now in the possession of this defendant, was and is void in part, and the surrender thereof by the plaintiff was repeatedly requested in order that a new certificate similar to the one hereto attached might issue thereon, but that plaintiff has failed and neglected for more than ten years last past to surrender same for such purpose, and that said plaintiff is entitled to no death benefit under the constitution and by-laws of said defendant organization other than as provided in said new certificate, a copy of which is hereto attached, and that defendant at all times since said convention has been ready and willing and now is ready and willing to issue and deliver to said plaintiff such new certificate in conformity with the said constitution and by-laws.

"That defendant, further answering, states and alleges that by the charter, constitution, and by-laws of defendant society, . . . it is provided that the constitution and by-laws may be changed, altered, amended, or repealed from time to time as the society may deem fit or necessary."

The court sustained the demurrer and the defendant appealed.

John J. Vlach, for the appellant.

F. F. Groelle, for the respondent.

VINJE, J. The demurrer to the answer presents the question whether the defendant, by amendment to its constitution or by-laws, could change the terms of the certificate issued to plaintiff in 1891 whereby he was made a beneficiary therein to the amount of $250 in the event his wife died during his lifetime, so as to cut off his right to receive said sum. Defendant contends that, since the certificate was issued upon condition that the plaintiff should "in every particular, while a member of said organization, comply with all the laws, rules, and regulations thereof," it was within its power to change its laws as it did in 1896; that such change was made necessary

because of the fact that it was found that members who received a cash payment upon the death of their wives lost interest in the society and usually allowed their insurance to lapse, and because it was deemed contrary to its articles of incorporation and to the laws of several states in which it did business. It is claimed the change was a reasonable and necessary one and did not deprive members of their vested rights. Conceding the necessity of the change from the standpoint of the defendant, can it be said that it did not deprive plaintiff of valuable contract rights? His contract was that the defendant should pay his wife $1,000 upon his death, but if she died before he did, then it should pay him $250 upon her death, and the balance, after his decease, to a beneficiary named by him. This contract was sought to be changed so as to cut off his right to receive the $250 upon the death of his wife and to make the whole sum of $1,000 payable upon his death. Manifestly such a change was a material change in the contract. Under the certificate issued to him plaintiff and his wife were both the insured and the beneficiaries. Under the attempted substituted contract the plaintiff alone was the insured and the wife alone the beneficiary.

The reserve power, made a part of the contract of insurance, that plaintiff should comply with all the laws, rules, and regulations of the defendant, warranted only reasonable changes in the manner and mode as to details of carrying out the scheme of insurance. It did not authorize defendant to nullify any essential feature of the contract entered into. *Wuerfler v. Trustees Grand Grove,* 116 Wis. 19, 92 N. W. 433; *Jaeger v. Grand Lodge,* 149 Wis. 354, 135 N. W. 869. It has been held that provisions in the articles of organization or by-laws existing at the time of the issuance of the certificate inconsistent therewith, must yield to the terms of the certificate, in the absence of some statutory provision or some rule of public policy to the contrary. *Ledebuhr v. Wis. T. Co.* 112 Wis. 657, 88 N. W. 607; *Wuerfler v. Trustees Grand Grove, supra; Koerts*

v. Grand Lodge, 119 Wis. 520, 97 N. W. 163; *Bruger v. Princeton & St. M. Mut. F. Ins. Co.* 129 Wis. 281, 109 N. W. 95. So changes made in the organic law of a benefit society or in the by-laws thereof which materially alter or affect the contract relations between the members and the society as expressed in the contract of insurance, must yield to the terms of the latter in the absence of consent or waiver, or of any statutory rule of public policy to the contrary, even where there is a provision in the certificate that the member will comply with the laws, rules, and regulations of the society or order as they may be enacted or amended from time to time in the future. Such provision relates to the conduct and government of the society in relation to its members and does not affect the substantial portions of its insurance contracts with them. True, it may authorize the society to change the details of the mode or manner in which it shall carry on the insurance part of its business, as well as its other business with members, but it cannot be made the cloak for compelling a member to accept a substantially different contract of insurance from the one entered into when the certificate was issued.

A further claim is made that the plaintiff must be held to have consented to the change in the terms of his certificate because he continued to pay his assessments for many years after he had notice of a change in the by-laws. The answer contains no such allegation of consent. On the contrary, it admits that plaintiff never consented thereto, for it alleges "that he was repeatedly requested to surrender the old certificate and to accept a new one issued under the new system, but the respondent never did so for more than ten years past." The answer, therefore, upon its face shows that plaintiff never consented to a change in the by-laws. He had a perfect right to continue to pay assessments upon the certificate issued to him in order to keep it in force, and was under no obligation to surrender it for cancellation.

By the Court.—Order affirmed.

ATLANTIC TERRA COTTA COMPANY, Appellant, vs. GOETZLER and another, Respondents.

April 26—May 14, 1912.

Contracts: Construction: Conflict between written and printed parts: Building contract: Time for furnishing materials.

1. Where a contract is filled in upon a printed form and the written provisions cannot be reconciled with the printed, the written provisions control.
2. In a contract dated May 26th, by which a manufacturer agreed to supply to a building contractor terra cotta from a factory in New Jersey for a store building being erected in Wisconsin (the plans and specifications of which the manufacturer already had), a printed provision that the contractor should furnish details was modified by a typewritten provision that the manufacturer should "make up and furnish to the architect all details for his correction, etc., as to measurements." Another provision (printed, except the typewritten word "eight") required the first shipment to be made "within eight weeks from the date of receipt by the manufacturer of proper detail drawings and complete information from which to do the work," balance to be delivered as rapidly as the construction demanded, "provided complete drawings and information be received prior to ——." Then, in typewriting, it was stated that the manufacturer agreed to ship certain parts of the material "within the time mentioned above, or at least enough of it so that the middle store . . . can be occupied by August 1st." According to the proof this would require shipment of July 13th. *Held*, that the eight-weeks period began to run from the date of the contract, and not from the time the detail drawings were approved and returned by the architect.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Plaintiff is a corporation having its factory and principal place of business at Perth Amboy, New Jersey. Plaintiff and defendants entered into a contract by which plaintiff agreed to furnish terra cotta for a building at Manitowoc, Wisconsin, for the sum of $4,800. This action was brought to recover an alleged balance of $560.25 due upon said con-

tract, and in addition thereto the sum of $44.10 on account of expense incurred at defendants' request in resetting three columns in the front of the building. The defendants admitted that the sum of $560.25 was due on the contract, but denied that they were indebted to the plaintiff in any other sum. The defendants also counterclaimed for various items of damage alleged to have been sustained by reason of the terra cotta not having been furnished within the time required by the contract and for failure to furnish the quality of terra cotta required. Defendants also interposed a counterclaim for labor paid and material furnished to an employee of the defendants in reconstructing the columns in the front of the building. The case was referred to a referee to hear, try, and determine, and the referee found that the plaintiff was entitled to recover the sum of $560.25 claimed, but was not entitled to recover the item of $44.10 which it claimed. The referee allowed the defendants on their counterclaims damages amounting to $379.50, and found that the plaintiff was entitled to judgment for $180.75, with interest from May 10, 1910. Both parties filed exceptions to the findings of fact and conclusions of law made by the referee and both parties moved to modify the referee's report and to confirm the same as modified. The circuit court confirmed the referee's report without modification and ordered that judgment be entered in accordance therewith. From a judgment rendered pursuant to this order the plaintiff appeals.

For the appellant there was a brief by *Paul D. Durant,* attorney, and *H. F. Friedrich,* of counsel, and oral argument by *Mr. Friedrich.*

For the respondents there was a brief by *Kelley & Ledvina,* and oral argument by *E. L. Kelley.*

BARNES, J. The appellant contends (1) that it shipped the terra cotta contracted for within the time required by the contract, and that in any event if there was a breach of the

contract in this regard it was waived; and (2) that it was entitled to recover the amount of $44.10 paid to its employee for work in reconstructing the columns in the front of the building. The referee found that proper detailed drawings and complete information were in the hands of the plaintiff as early as May 27, 1909, and that the eight-weeks period for shipment provided for in the contract should be computed from that date. The appellant contends that it was not in possession of such drawings and information until June 16th, and that the time for delivery should be computed from that date. The first shipment was not made until August 14, 1909; the second was made August 21st, and the final one September 15th.

The contract used was a printed form prepared by the plaintiff. At the end of the fourth article thereof the following addition was made in typewriting: "It is further agreed that manufacturer will make up and furnish to the architect all details for his correction, etc., as to measurements."

The following portion of article V was printed, except the word "eight," which was in typewriting:

"The first shipment of the material covered by this contract shall be begun within *eight* weeks from the date of receipt by the manufacturer of proper detail drawings and complete information from which to make the work, and the balance of the material shall be delivered as rapidly as the construction at the building shall require the same, provided complete drawings and information be received prior to ——."

Immediately thereafter the following was inserted in typewriting:

"Manufacturer agrees to ship the material required below the moulded course over first-story windows within the time mentioned above or at least enough of it so that the middle store next to main entrance Eighth street front can be occupied by August first, 1909."

The contract was executed on May 26, 1909. The plans and specifications drawn by the architect had been in the

hands of the plaintiff for some time before this date. The referee found on sufficient evidence that it required eight days for a car to reach Manitowoc from plaintiff's factory; that it required ten days to unload, lay out, and set in place the terra cotta needed for the middle store so as to have it ready for occupancy by August 1st, and that the material required for said store building should have been shipped as early as July 13th. It is undisputed that the first carload was shipped August 14th, the second August 21st, and the final car September 15th. The referee also found that under the contract the plaintiff was obliged to ship all of the terra cotta within eight weeks from May 27th.

There is some force in the claim of the appellant that, inasmuch as it was obliged to prepare details and submit them to the architect for approval, the eight-weeks period did not commence to run until such details were completed and sent to the architect and approved and returned by him. The matter of settling upon the details and of receiving "complete information," according to appellant's contention, was not concluded until June 16th.

If we were to adopt the construction of the contract most favorable to the appellant that it would possibly bear, it is apparent that there were two substantial breaches of it.

It is clear that the undertaking of the appellant to furnish enough terra cotta so that the middle store could be made ready for occupancy by August 1st was absolute, unless there was some unnecessary delay for which the respondent was responsible, and there was none. This material should have been shipped as early as July 13th, whereas the first shipment was not made until more than a month thereafter. Conceding that the eight-weeks period as to all of the material except that needed to complete the middle store began to run on June 16th instead of May 27th, the contract was breached as to this portion of the terra cotta also, because it provided that after the eight weeks had elapsed the material was to be "delivered as

rapidly as the construction at the building shall require the same." This was not done. The eight-weeks period, computed from June 16th, would expire August 11th, and the last shipment was not made until September 4th, and the evidence shows there was considerable delay and waiting for this last shipment as well as for the others.

It is apparent, therefore, that if the contract be given a construction decidedly favorable to the appellant, it was breached in the two particulars mentioned, and these breaches would be sufficient to sustain the judgment if we knew that the same damages would result therefrom as were found to result from the breaches found by the referee and the circuit judge. The referee reached the conclusion that appellant was obliged to ship the terra cotta needed for the middle store as early as July 13th, and to commence shipping the balance by July 22d, that is, eight weeks from May 27th, and further found that the respondents sustained the following items of damage because of noncompliance with the contract so interpreted: Extra cost in the erection of inside walls, $120; extra cost in rebuilding scaffolds and shoring up joists, $117.50; expense of heating, due to delay in the work until cold weather set in, $98; material and labor furnished plaintiff in resetting columns, $44; making in all $379.50. It might well be that if the referee had concluded that appellant was not obliged to begin shipping the terra cotta, except that required for the middle building, until eight weeks from June 16th instead of eight weeks from May 27th, he would not have allowed as much damages as he did for extra fuel cost and possibly not so much on some other items. We therefore conclude that the judgment must be sustained, if it is sustained, on the theory that the referee and the court placed a proper interpretation on the contract. The difficulty in arriving at the intention of the parties is due to the fact that art. V of the contract as printed was allowed to remain intact and uncompleted although it did not express the agreement arrived at, and be-

cause it is not clear to what extent the parties intended to modify it by the written portion of the contract immediately following. It is a well recognized rule of construction that where a contract "is written in part and printed in part, as where it has been filled in upon a printed form, the parties usually pay much more attention to the written parts than to the printed parts. Accordingly, if the written provisions cannot be reconciled with the printed, the written provisions control." *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 589, 120 N. W. 512; *Gilbert v. Stockman,* 76 Wis. 62, 65, 44 N. W. 845; 2 Page, Contracts, § 1119.

The referee concluded that the parties intended that the eight-weeks period should commence to run from the day after the date of the contract, and that, taking art. V as a whole, there was no design to extend the period of delivery until eight weeks after the details had been completed and were approved and returned by the architect. In support of this construction, it appears that the printed portion of the contract requires the contractor, instead of the manufacturer, to make and furnish details. If this provision was permitted to remain intact, the reason for having the eight-weeks period begin to run after the details were furnished is obvious. The plaintiff could not know when the details would be furnished by someone else. But this part of the contract was modified by requiring the plaintiff to furnish the details, so the time of their preparation was under its control and it knew just how long their preparation would take. In the next place it is somewhat significant that, after providing for the first shipment, the printed portion of the contract is incomplete as to when the balance of the material shall be shipped. It recites that the same shall be shipped as rapidly as the construction of the building shall require, "provided complete drawings and information be received prior to,"—no date being inserted. More significant still is the language used in the typewritten portion of art. V. By it the manufacturer agreed to

ship the material for the middle store within "the time mentioned above," or enough of it so that the store could be occupied by August 1st. The words "time mentioned above" mean either "eight weeks" from the date of the contract or they mean eight weeks from the time within which detail drawings would be prepared and approved and full information furnished. If they mean the latter, then it is perfectly apparent that the details could not be prepared at Perth Amboy, New Jersey, forwarded to Manitowoc for approval by the architect, and be returned by him to the shop, and eight weeks time taken thereafter to prepare and load the material, and still have it arrive in time to permit the completion of the middle store building by August 1st. There is nothing to indicate that this date was inserted for the purpose of shortening the time of performance of the contract. On the contrary, it would seem to have been inserted for the benefit of the manufacturer. The material below the moulded course over the first-story windows was to be shipped "within the time mentioned above," or *"at least enough of it"* to permit the middle store to be occupied by August 1st. The parties evidently had in mind that all of the terra cotta below the moulded course referred to should be shipped before August 1st in order to meet the contract requirements. This is consistent with the idea that the eight-weeks period commenced to run with the date of the contract and that the parties understood that in so far as the time of performance was involved the plans and specifications which the plaintiff had in its possession for some time and from which it proposed to prepare the details constituted the full information which the defendants were to furnish. It is clear that the contractor was not required to either make or furnish detail drawings, notwithstanding what is said in art. V of the contract. If any particular significance is to be given to the words "receipt . . . of complete information," we think the parties had in mind the plans and specifications rather than any comments which the architect

might make on the details which were sent to him for approval.

On the other points raised the findings of the referee are sustained by the evidence. We find no error in the record, and the judgment must therefore be affirmed.

By the Court.—Judgment affirmed.

WILL OF DERRICKSON: Dow and others, Appellants, vs. HAMILTON and others, Respondents.

April 26—May 14, 1912.

Wills: Construction: Legacies.

A will (1) provided that testator's debts be paid; (2) gave $1,000 to his daughter or, if she predeceased him, to her children; (3) directed the sale of all testator's real estate and personal property and that out of the proceeds thereof, after the payment of debts and expenses of administration, the executor "pay the legacies hereinafter named;" (4) directed the executor to pay specific sums to persons named, including children of the daughter named in the second paragraph; (5) provided: "In case the proceeds of my estate are not sufficient to pay all of said legacies in full, the shortage shall be borne by all in proportion to their respective legacies, and if said estate is more than sufficient to pay said legacies, said legatees shall share the same in proportion to their respective legacies." *Held*, that the fifth paragraph refers to all legacies given by the second and fourth paragraphs, not merely to those given by the fourth paragraph. MARSHALL, J., WINSLOW, C. J., and VINJE, J., dissent.

APPEAL from a judgment of the circuit court for Richland county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

Thomas P. Derrickson died December 9, 1909, leaving a will of which the portions involved in this proceeding are as follows:

"Second. I give and devise to my daughter, Elizabeth Hamilton, the sum of one thousand dollars, and in case she dies before I do, I will that said sum of money shall go to her children in equal shares.

"Third. I will and request that my executor sell all of my real estate and personal property of which I die seized, and out of the proceeds thereof and after all my debts and expenses of administration are paid, that said executor pay the legacies hereinafter named.

"Fourth. My executor shall pay to *Leon Dow,* of Aubrey, the sum of two hundred dollars; to *Jessie Hamilton,* of Aubrey, the sum of three hundred dollars; to *Harriet E. Dow,* of Aubrey, the sum of one thousand dollars; to George Harring, of Wood county, Wisconsin, the sum of three hundred dollars; to *Nellie Harring,* of Cincinnati, Ohio, the sum of five hundred dollars; to *Audley Hamilton,* of Aubrey, the sum of one hundred dollars; to *Ethel Hamilton,* of Aubrey, the sum of two hundred dollars; to *Ione Hamilton,* of Aubrey, the sum of two hundred dollars; to my daughter, Emma Ostrander, the sum of five hundred dollars.

"Fifth. In case the proceeds of my estate are not sufficient to pay all of said legacies in full, the shortage shall be borne by all in proportion to their respective legacies, and if said estate is more than sufficient to pay said legacies, said legatees shall share the same in proportion to their respective legacies."

Elizabeth Hamilton, named in the second clause of the will, was a daughter of Thomas P. Derrickson. She died May 28, 1905, twenty-five days after the execution of the will. *Jessie Hamilton, Audley Hamilton, Ethel Hamilton,* and *Ione Hamilton,* mentioned in the fourth clause of the will, are children of Elizabeth Hamilton.

After the payment of all the legacies mentioned in the will there remains a surplus of over $9,500.

The county court entered a judgment construing the will, holding that the children of Elizabeth Hamilton would take shares in the surplus under the second clause of the will, and that the legatees named in the second and fourth clauses of the will were in the same class and were all alike included in the distribution provided by the fifth clause of the will. Final judgment was also made by the county court distributing the estate in accordance with the construction previously given.

Upon appeal to the circuit court a judgment was awarded affirming the judgment of the county court and making dis-

tribution of the surplus as had been made by the county court. This is an appeal from such judgment.

Elbert E. Brindley, for the appellants.

Vroman Mason, for the respondents, as to the significance of the word "said" in the fifth paragraph of the will, cited *Richards v. Koenig,* 24 Wis. 360, 364; 2 Bouv. Law Dict. 942; *Brown v. State,* 28 Tex. Ct. App. 379, 13 S. W. 150, 151.

SIEBECKER, J. The county court and the circuit court on appeal were of the opinion that the testator intended in the fifth clause of the will to include all legacies theretofore named in the second and fourth clauses of the will. The language of the fifth clause clearly refers to all of the testator's estate, for he says, "In case the proceeds of my estate are not sufficient to pay all of said legacies in full," then "the shortage shall be borne by all in proportion to their respective legacies." There certainly can be no question that the legacy to Elizabeth Hamilton, bequeathed in the second clause, was to be paid out of "the proceeds" the testator had in mind when he spoke of "the proceeds of my estate" in the provisions of the fifth clause. This being true, it follows as a matter of course that the phrase in the same sentence, "all of said legacies," of necessity, refers to and includes all of the legacies referred to in the fifth clause, which he intended should be paid out of "the proceeds of my estate." These ideas inhere in and are part of the plain and natural signification of the words the testator used in expressing his will in this provision, and hence no occasion is presented for giving them a different meaning, unless it be that other parts of the will necessarily conflict therewith and call for a different interpretation of them. An examination of the other clauses, however, discloses that their contexts are in complete harmony with this meaning of clause 5.

It is, however, claimed that the fifth clause refers only to the class of legatees created by clause 4 and that the contexts

of clauses 2 and 4, in connection with their separation in the will by clause 3, as well as the separate provision for his daughter Elizabeth, contained in clause 2, show a clear intent to create two classes of legatees by clauses 2 and 4. But wherein does the context of clause 3, directing the executor to sell testator's real and personal property and out of the proceeds to pay his debts, expenses of administration, and "the legacies hereinafter named," evince any intent to restrict the natural meaning of the words employed in clause 5? True, the proceeds were to be applied in payment of the legacies created in clause 4, but the legacy in clause 2 must also be paid, and whence, if not out of the proceeds realized on a sale of his real and personal property, referred to in clause 3?

Again, it is argued: If it was the testator's intent to make one class of legatees, why did he create it in two separate clauses? And it is argued: Would he not with such intent in mind have put them all in clause 4? While he might have done so, he chose this different way, and if this, his way, is a proper way, we must respect and follow it. The fact that he chose this form and adopted it to express his will suggests no reason, purpose, or intent to give a meaning to clause 5 different from what the words naturally mean when applied to the facts and circumstances which occupied his mind in making a will.

We are persuaded that the will is plain and unambiguous and that the construction contended for by the appellants is conjectural and would modify the testator's will so as to change his intention and understanding as expressed therein. It is considered that the county court and the circuit court gave a correct interpretation to the will and entered the proper judgment in the case.

By the Court.—Judgment affirmed.

MARSHALL, J. (*dissenting*). I cannot agree with the result reached in this case. As I read the will it is perfectly manifest that subdivision 5 refers only to subdivision 4. The

writing seems too clear to be regarded open for construction. A mere reading thereof is sufficient to give emphasis to this. I requote the instrument:

"First. I desire that all my just debts be paid in full.

"Second. I give and devise to my daughter, Elizabeth Hamilton, the sum of one thousand dollars, and in case she dies before I do, I will that said sum of money shall go to her children in equal shares.

"Third. I will and request that my executor sell all of my real estate and personal property of which I die seized, and out of the proceeds thereof and after all my debts and expenses of administration are paid, that said executor pay the legacies hereinafter named.

"Fourth. My executor shall pay to *Leon Dow,* of Aubrey, the sum of two hundred dollars; to *Jessie Hamilton,* of Aubrey, the sum of three hundred dollars; to *Harriet E. Dow,* of Aubrey, the sum of one thousand dollars; to George Harring, of Wood county, Wisconsin, the sum of three hundred dollars; to *Nellie Harring,* of Cincinnati, Ohio, the sum of five hundred dollars; to *Audley Hamilton,* of Aubrey, the sum of one hundred dollars; to *Ethel Hamilton,* of Aubrey, the sum of two hundred dollars; to *Ione Hamilton,* of Aubrey, the sum of two hundred dollars; to my daughter, Emma Ostrander, the sum of five hundred dollars.

"Fifth. In case the proceeds of my estate are not sufficient to pay all of said legacies in full, the shortage shall be borne by all in proportion to their respective legacies, and if said estate is more than sufficient to pay said legacies, said legatees shall share the same in proportion to their respective legacies. . . . "

Thus it will be seen that the testator bequeathed $1,000, without qualification, to his daughter; evidently supposing it would be satisfied without selling any of his realty or personalty. Next he directed such property to be turned into money and specific sums to be paid to particular persons, not naming the daughter. Again indicating, unmistakably, I venture to say, that he supposed she would be provided for without converting personalty and realty into money. These specific bequests, it will be noted, follow the language "pay the legacies hereinafter named." Thus emphasizing the idea before and

after expressed that "said legacies" were treated as wholly apart from the positive bequest to the daughter. The fourth treated the numerous bequests mentioned as a group, each being of equal grade with the rest and all being denominated as "legacies." Then follows the fifth subdivision directing what should be done in case of the proceeds of the estate not being sufficient, or more than enough, "to pay all said legacies in full." Do not the words "said legacies" thus point straight to the words "the legacies" in the preceding subdivision? It seems so; that the whole will is in perfect harmony therewith; that any other reading violates both the letter and spirit of the instrument and, in effect, judicially makes a will which the testator never thought of making.

WINSLOW, C. J., and VINJE, J. We concur in the foregoing dissenting opinion of Mr. Justice MARSHALL.

On June 19, 1912, the mandate was amended so as to provide that the costs be taxed and paid out of the estate.

ARMSTRONG, Executor, Respondent, vs. BLANCHARD and others, imp., Appellants.

April 26—May 14, 1912.

Life insurance: Mutual benefit societies: By-laws as part of contract: Construction: Who may be beneficiaries: Right to dispose of proceeds of certificate by will.

1. Provisions in the by-laws of a mutual benefit society, which became part of the insurance contract with a certificate holder, as to who might be named as beneficiaries either originally or when a change was made, and that "no payments shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, heir, blood relative, or person dependent upon or member of the family of the member at the time of his death," and that in case no beneficiary is

named or if those named predecease the certificate holder the amount due on the certificate shall be payable to the immediate relatives and heirs in a certain order therein named, and in default of any such relatives and heirs surviving "then to the next of kin who would be the distributees of the personal estate of the member upon his death intestate,"—did not deprive the certificate holder of the right, which attaches to his insurance contract under the laws of this state, to dispose by will of the proceeds of his certificate.

2. So *held*, in a case where the beneficiary named had predeceased the certificate holder and no new beneficiary had been designated in accordance with the by-laws, and the certificate holder bequeathed the proceeds of the certificate to nieces and a cousin, who were not his heirs at law nor his immediate relatives in the order named in the by-laws, there being surviving brothers and a sister.

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action by the executor of the last will and testament of Reuben D. Blanchard, deceased, to recover the amount of a benefit certificate issued by the Modern Woodmen of America, dated January 27, 1892, payable by the terms of the certificate to Lucy Blanchard, adopted mother of the deceased.

Lucy Blanchard died in 1901. Reuben D. Blanchard died in 1910 without having changed the beneficiary named in the benefit certificate pursuant to the by-laws of the society. By the by-laws of the society a member may name as beneficiaries "the wife, surviving children, or some other person or persons, . . . who are related to the member as heir, blood relative, or person dependent upon him, or member of his family whom the applicant shall designate in his application. No payment shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, heir, blood relative, or person dependent upon or member of the family of the member at the time of his death." The beneficiary named by the deceased died in 1901 and he failed to name another. The provisions of the by-laws applicable to

the situation are the following parts of sec. 46, which provides that under such a condition the amount of the certificate shall be payable

"to the widow, if no widow, to his children, including his legally adopted children, and in case there are deceased children or child, the children or child of such shall take the share of such deceased parent; if no children, or child of the deceased children or child, to the mother; if no mother, to the father; if no father, to the brothers and sisters, share and share alike, and in case there are deceased brothers or sisters, then to the children or child of such, who shall take the share of such deceased parent; if no brothers or sisters or children or child of any deceased brother or sister, then to the next of kin, who would be the distributees of the personal estate of the member upon his death intestate according to the laws of the state wherein the said member resided at the time of his death."

Sec. 47 of the by-laws provides the procedure for making a change of beneficiaries, and also:

"The new beneficiary or beneficiaries so named shall be within the description of beneficiaries contained in sec. 45 hereof. [Quoted on p. 32.] No change in the designation of the beneficiaries shall be of binding force unless made in compliance with this section."

The will of Reuben D. Blanchard contains the following provision:

"I give, devise and bequeath to my niece, Effie Munns, the sum of one thousand dollars ($1,000), and to my niece, Claudia N. Jones, a like sum of one thousand dollars ($1,000); also to my beloved cousin, Marian Byerly, in partial recognition of her many deeds of kindness, care and attention, the further sum of one thousand dollars ($1,000), the said sum of three thousand dollars ($3,000) constituting the life insurance policy of $3,000 in the Modern Woodmen of America."

By an order of the trial court the legatees named in this clause of the will, Ella M. Jones, the heir at law of Lucy Blanchard, and two brothers and a sister of the deceased, were

substituted for the Modern Woodmen of America; the $3,000 proceeds of the certificate was directed to be paid into court; and the Modern Woodmen of America, the original defendant, was released. Ella M. Jones has assigned her interest to the legatees named in the will.

The trial court found that the deceased had a legal right to dispose of the proceeds of the benefit certificate by will and that he had by his will bequeathed the avails thereof or the moneys arising therefrom to the legatees named in the will; that the brothers and sister of the deceased, his only surviving heirs at law, had no legal claim to any part of the moneys arising from the benefit certificate; and that the plaintiff, as executor, was entitled to the $3,000 arising from the benefit certificate, for the benefit of the legatees as provided in the will.

This is an appeal from the judgment in accord with the findings of the court.

For the appellants the cause was submitted on the brief of *Brown, Brennan & Carthew.* They contended, *inter alia,* that there can be no change of beneficiary in a mutual benefit certificate by the will of a member, where that change is in violation of the by-laws of the society; nor can there be any disposition of the benefit in that manner. *Thomas v. Covert,* 126 Wis. 593, 105 N. W. 922; *Holland v. Taylor,* 111 Ind. 121, 12 N. E. 116; *Stephenson v. Stephenson,* 64 Iowa, 534, 21 N. W. 19; *Hainer v. Iowa Legion of Honor,* 78 Iowa, 245, 43 N. W. 185; *Daniels v. Pratt,* 143 Mass. 216, 10 N. E. 166; *Maryland Mut. Ben. Soc. v. Clendinen,* 44 Md. 429, 22 Am. Rep. 52; *McCarthy v. Supreme Lodge,* 153 Mass. 314, 26 N. E. 866; *Fink v. Fink,* 171 N. Y. 616, 64 N. E. 506; *Hellenberg v. District No. 1,* 94 N. Y. 580; *Harton's Estate,* 213 Pa. St. 499, 62 Atl. 1058; *Northwestern M. A. Asso. v. Jones,* 154 Pa. St. 99, 26 Atl. 253; *De Silva v. Supreme Council,* 109 Cal. 373, 42 Pac. 32; *Burke v. Modern Woodmen,* 2 Cal. App. 611, 84 Pac. 275; *Sheehan v. Journeymen Butchers' P. & B. Asso.* 142 Cal. 489, 76 Pac. 238; *Wendt v.*

Iowa Legion of Honor, 72 Iowa, 682, 34 N. W. 470; *Supreme Lodge v. Nairn,* 60 Mich. 44, 26 N. W. 826; *Pilcher v. Puckett,* 77 Kan. 284, 94 Pac. 132, 17 L. R. A. N. S. 1083 and note; *Grand Lodge v. Fisk,* 126 Mich. 356, 85 N. W. 875; *Schardt v. Schardt,* 100 Tenn. 276, 45 S. W. 340; Niblack, Ben. Soc. § 237; *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948; *Hutson v. Jenson,* 110 Wis. 26, 85 N. W. 689; *Ballou v. Gile,* 50 Wis. 614, 7 N. W. 561; *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378; *Dietrich v. Madison R. Asso.* 45 Wis. 79. The sole purpose of this society is to afford death benefits to the family and dependents of the beneficiary, and to permit a change or disposal by will would be to force the society to do an act outside of the scope of its authority and purposes, and would be a total subversion of its purposes.

W. E. Howe, for the respondent.

SIEBECKER, J. The certificate, which is the contract of insurance, limits the amount due on it at the death of the member of the insurance order to $3,000, and specifies that it is issued subject to the fundamental laws of the order and is liable to forfeiture if the certificate holder does not comply with its conditions, the laws, by-laws, and such rules as are or may be adopted by the order. The assured has complied with all the conditions and the order is liable for the sum of $3,000 to whomsoever may be entitled thereto. This the representatives of the order acknowledged. They appeared in court confessing liability on the certificate and were given the opportunity to pay this amount into court and be released from further appearance in the case, the rights of the claimants thereto being submitted to the court, the sum to be paid to such persons as the court might adjudge.

As shown in the foregoing statement, the certificate holder had designated his mother by adoption as beneficiary when the certificate issued. She predeceased him in 1901, and no other

beneficiary was named by him. In November, 1910, he made his will containing the provisions above set forth, giving and bequeathing to his two nieces and his cousin, each the sum of $1,000, "the said sum of three thousand dollars ($3,000) constituting the life insurance policy of $3,000 in the Modern Woodmen of America." It is clear that the testator intended that these legatees should receive the proceeds of this certificate. Decedent's brothers and sister, the appealing defendants, allege and claim that decedent's attempt to dispose of these proceeds of the certificate by will is ineffectual, and that they are lawfully entitled thereto under the contract of insurance and the fundamental laws of the order. The fundamental laws of the order are effectual parts of the decedent's contract and are binding upon him as a certificate holder. Sec. 45 of the by-laws (stated above) provided who might be named as beneficiaries, and that:

"No payment shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, heir, blood relative, or person dependent upon or member of the family of the member at the time of his death."

The by-laws make provision for a change of beneficiary by the insured in his lifetime, and provide that in such change of beneficiary the new beneficiary so named shall be within the description of those named in sec. 45, and that no change of beneficiary shall become effectual unless made in compliance with this rule. Sec. 46 of the by-laws prescribes that the amount due on the certificate, in case no beneficiary is named or if those named predecease the certificate holder, shall be payable to the immediate relatives and heirs in the order named, and that in default of any such relatives and heirs surviving, "then to the next of kin, who would be the distributees of the personal estate of the member upon his death intestate according to the laws of the state wherein the said member resided at the time of his death." These provisions on these

subjects contain nothing to indicate that the certificate holder is deprived of the right to dispose of the proceeds by will, which attaches to his contract under the law of this state. The right to so dispose of the proceeds of an insurance contract has been recognized in the decisions of this court when the insured has paid the premiums and kept control of the contract. It is clearly established in the following cases and the adjudications referred to therein: *Berg v. Damkoehler,* 112 Wis. 587, 88 N. W. 606; *Rawson v. Milwaukee Mut. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378; *Opitz v. Karel,* 118 Wis. 527, 95 N. W. 948; *Slocum v. Northwestern Nat. L. Ins. Co.* 135 Wis. 288, 115 N. W. 796. In the case of *Thomas v. Covert,* 126 Wis. 593, 105 N. W. 922, the insured had agreed to forego the right to dispose of the proceeds of his certificate by will, and the stipulations on the subject, not being against law or public policy, were enforceable as part of the contract of insurance.

The fundamental laws of this order and the contract of insurance containing no provision precluding the deceased from disposing of the proceeds of the certificate by his will, it follows that the parties to whom he bequeathed them are entitled thereto. The right which attached to his contract under the laws of this state was properly exercised by him and controls the disposition of the proceeds of his certificate. The trial court awarded the appropriate judgment for the disposition of the funds deposited with the clerk of the court.

By the Court.—Judgment affirmed.

CARLONE, Plaintiff in error, vs. THE STATE, Defendant in error.

April 27—May 14, 1912.

Criminal law: Homicide: Degrees: Murder in second degree: Manslaughter: "Heat of passion:" Evidence: Sufficiency: Instructions to jury: Harmless errors.

1. Where, upon his own testimony, accepting it as true, the accused should have been convicted, as he was, of murder in the second degree, he was not prejudiced by an incorrect definition, in the charge, of manslaughter in the fourth degree.
2. To bring a homicide within the third degree of manslaughter as defined in sec. 4354, Stats. (1898), it is not sufficient proof of "heat of passion" for the accused merely to testify that he was exceedingly angry or passionate at the moment in question, but such testimony must be supplemented by proof of facts and circumstances showing such provocation as would ordinarily produce heat of passion.
3. Where a middle-aged man, a member of a gang of section workers on a railroad, had locked out of a box car in which they slept a boy about sixteen years old who was in the habit of returning to the car after the others had retired and disturbing their rest, and in the quarrel which followed the boy, although he was in no personal danger and there was nothing to indicate that the man intended any harm to him or to put any great affront upon him, procured a rifle and either shot at the man or, as he testified, attempted to "shoot past him" and scare him, and in so doing killed another person in the car, he was guilty at least of murder in the second degree.

ERROR to review a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

John Walsh, for the plaintiff in error.

For the defendant in error there was a brief by *E. C. Alvord,* district attorney, and the *Attorney General* and *Russell Jackson,* deputy attorney general, and oral argument by *Mr. Alvord* and *Mr. Jackson.*

TIMLIN, J. The accused was informed against for murder in the first degree, convicted of murder in the second degree, and sentenced to the state prison for a period of fifteen years.

(1) It is contended that the court below, in its instructions to the jury, erred in defining manslaughter to be "an involuntary killing of another by any weapon or by any means either cruel, unusual, or in the heat of passion." (2) Also in refusing to instruct the jury that they might find the defendant guilty of manslaughter in the third degree as defined by sec. 4354, Stats. (1898).

In order to ascertain the legal sufficiency of these assignments of error we must refer to the evidence. The accused was a boy about fifteen or sixteen years of age, worked at section work on a railroad with Nick Alberico, a boy of his own age, Joseph Alberico, the father of Nick, and Salvator Riconsona. They lodged together and prepared their meals in a box car left on the west side of the railroad tracks and a little to the north of Drummond station. In this car were beds and cooking utensils. The car had a sliding door in the center on each side. The accused was accustomed to go out of the car after supper and remain out some time and return about 9 o'clock at night. The other occupants of the car, who usually locked the car door from the inside and retired early, were apparently dissatisfied with such conduct on the part of the accused, which interrupted their rest and required them to either leave the car door open when they retired to their beds for the night or get up and open the door to let the accused in on his return. On the night of the homicide Joseph informed the accused that he better come back before 9 o'clock because he, Joseph, would not keep the car door open until 11 or 12 o'clock every night. The accused made no answer but went away as usual, returned about half past 9, found the car door locked, shook it, and demanded of Joseph that he open the door. There is some conflict in the testimony as to what then took place. But it seems to us there was nothing more than an ordinary verbal quarrel and a threat on the part of Joseph to lock the accused out. Joseph was barefooted. The accused claims that Joseph kicked at him or kicked him and swore at him, but this is denied. Joseph, however, did lock him out

and apparently retired for the night. The accused went some distance to a tool car, procured a lining bar and a rifle which he found in the tool car, laid down the rifle at some distance from the door of the car in which his comrades were, and attempted to force open this door with the lining bar. He claims he heard some noises inside as if Joseph was getting an ax. Joseph, hearing the attempt to force open the door, came, together with his son Nick, to the door and pushed it partly open and stood in this entrance unarmed and partially undressed. His son Nick stood beside him and partially behind him. Accused went back to where he left the rifle, shot at Joseph, and killed Nick instantly. Accused testifies that he did not intend to kill either of them, but tried to shoot past Joseph so as to scare him, and at no time had any thought of killing or shooting at Nick. When accused seized the rifle and fired the shot in question he was at a safe distance, there was no assault or other injury impending against him, neither Joseph nor Nick had made any move to descend from the car, and after firing the fatal shot the accused fired two more shots through the car. Joseph, seeing that his son was shot down, leaped out of the car and ran toward the accused, who dropped the gun and took to flight. Accused testifies also that he was crying and that he was very angry. He was arrested afterward and told the officer that he intended to kill Joseph but not Nick, and that he would kill the whole family. Afterward while he was in jail awaiting trial he wrote a letter stating: "I went down to the car house and then I got the rifle and I went back to kill his father and I missed him and I killed the boy."

With reference to the errors assigned. The accused was in no wise prejudiced by the incorrect definition of manslaughter in the fourth degree. Under the definition given the court would permit the jury to reduce the homicide to manslaughter in the fourth degree, even though the killing was cruel or unusual or in the heat of passion. The accused was entitled to

no such exemption from the consequences of his act, and the jury by finding him guilty of murder in the second degree very properly refused to consider the crime of manslaughter even as thus liberally defined.

The statute (sec. 4354, Stats. 1898) defining the third degree of manslaughter is as follows:

"Any person who shall kill another in the heat of passion without a design to effect death, by a dangerous weapon, in any case except such wherein the killing of another is herein declared to be justifiable or excusable, shall be deemed guilty of manslaughter in the third degree."

There is no evidence in this case to bring the homicide in question within the third degree of manslaughter as thus defined. It is not sufficient proof of heat of passion for the accused to merely testify that he was exceedingly angry or passionate at the moment in question. Such testimony must be supplemented by proof of facts and circumstances showing such provocation as would ordinarily produce heat of passion. *Ryan v. State,* 115 Wis. 488, 92 N. W. 271; *Johnson v. State,* 129 Wis. 146, 108 N. W. 55. These circumstances are entirely wanting in the instant case. The quarrel which resulted in the homicide was a very ordinary dispute between a hardworking middle-aged man who desired rest at night after his day's labor and a boy who was anxious for pleasure or excitement. Aside from locking him out of the car there was nothing to indicate that Joseph or those with him intended any harm to accused or to put any great affront upon him. Petty disagreements of this kind cannot be settled with a rifle. Nor can a person in no personal danger and subjected to no extraordinary provocation have recourse to a lethal weapon and take human life and then mitigate the offense by his own statement of his causeless anger or passion. Besides, the accused went on the stand and testified that he shot by design, that is in the endeavor to shoot "past" Joseph and scare him. This is inconsistent with heat of passion. But it is absolutely

consistent with murder in the second degree, because the homicide was perpetrated by an act imminently dangerous to others, evincing a depraved mind, regardless of human life, without any premeditated design to effect the death of the person killed or of any human being. Upon the testimony of the witnesses for the state the accused should have been convicted of murder in the first degree. Upon his own testimony, accepting it as true, he should have been convicted, as he was, of murder in the second degree. The time is gone by, if it ever existed, when technicalities or unnecessary refinements can be allowed to stand in the way of the vindication of the law or the punishment according to law of those unquestionably and legally guilty of murder.

By the Court.—Judgment of the circuit court is affirmed.

FIREMEN'S FUND INSURANCE COMPANY, Respondent, vs. SCHREIBER, Appellant.

December 9, 1911—June 4, 1912.

Bailments: Negligence: Liability: Wrongful act of bailee's servant: Scope of employment: Automobiles: Joy ride by servant in charge of garage.

1. In case of a bailment for hire, in general, the bailee is liable only for the exercise of ordinary care,—he is in no sense an insurer.
2. The measure of care called for by the foregoing rule is such as men, in general, of common prudence ordinarily bestow upon their own property similarly situated.
3. A contract of bailment, in the absence of special situations to the contrary, involves, by necessary inference, an understanding that the bailee may use the usual means of executing the agreement.
4. The rule, last stated, includes the privilege of employing assistants and delegating the work, in whole or in part, to them,

being responsible for their conduct while acting within the scope of their employment and performing the duty of the principal.

5. The principal, in the circumstances of the last foregoing, is not an insurer as to the conduct of his employee. He is responsible for ordinary care in the selection of his agents, ordinary care as regards retaining them in his employ, and responsible, *respondeat superior*, for all negligences and wrongful acts of the agent within the scope of the employment in the execution of the contract of bailment.

6. The rule may be stated, as commonly, thus: The master is liable for all acts of his servant while engaged in his master's business within the scope of such servant's authority in furtherance of such business; but, if he steps aside therefrom and proceeds to serve some purpose of his own, the master is not liable.

7. Departure of the agent from the scope of his employment to effect a personal purpose, severs the connection between him, his principal, and the latter's employer, rendering him, alone, liable for his wrongful conduct to such employer's damage.

8. If the agent, acting within the scope of his employment, performs the principal's duty in an unauthorized way to the damage of the latter's employer, such principal is liable therefor; but, if a wrong be done by the agent outside the scope of his employment to the damage of such employer, though perpetrated within the period of such employment and through capacity acquired by reason of the employment, such principal is not liable.

9. The doctrine respecting the liability of a railroad company for the conduct of its employees in the course of their employment, whether within the scope thereof or not, as in *Craker v. C. & N. W. R. Co.* 36 Wis. 657, does not rest on the principle of *respondeat superior;* it is a special liability grounded on absolute duty, and liability for the safety of passengers as regards negligent acts of such employees in the course of their employment, and does not apply to situations in general,—they are governed by the ordinary rule of *respondeat superior.*

10. To render the wrong of the agent that of the principal,—*respondeat superior,*—the fact that it was done in the course or period of employment, is not sufficient; it must be in the prosecution of the principal's business, not by stepping aside therefrom to serve a personal end.

11. The element of stepping aside, mentioned in the last foregoing, which is essential to break the *nexus* between the principal, the agent, and the employer of such principal, needs only change of mental attitude from that of serving the principal to that of serving a personal end; no particular interval of time is necessary.

[Syllabus by MARSHALL, J.]

KERWIN, SIEBECKER, and TIMLIN, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Reversed.*

Action to recover of a bailee for the wrongful act of his servant while in the line of duty.

Plaintiff insured one Schleisinger against damage to his automobile, while in use. The machine was kept in defendant's garage, he receiving $20 per month for housing and care. He had in his employ one Flynn whose duty it was to be at the garage at 6 o'clock p. m.,—the time for the day attendants to quit work,—and stay through the evening and into the night so long as necessary to do the work of washing automobiles and polishing the brass and nickel work and letting patrons in or out with their machines. His quitting time was from midnight to 4 or 5 o'clock in the morning, according to circumstances. While on duty he was the only attendant. Customarily he kept the door locked, but opened it from time to time to accommodate customers. Upon leaving the garage without any attendant it was his business to lock the door. On the occasion in question, about 1:30 a. m., having completed his work of washing and polishing, he left the garage to go to a near-by lunch counter. He had lost his key, so attached a wire to one of the upper door bolts, leaving the end outside, with which he could by pulling slide the bolt up and down and release the door. Upon going out he left his coat intending to return and permanently close the place for the night. While at lunch he fell in with an acquaintance and they conceived the idea of taking the machine in question and having a ride. No one had a right to take out the machine without

the owner's permission which was not given. The two executed their plan and while using the machine within the risks insured against under the policy, injured it. Plaintiff was compelled to pay the loss. Thereupon it commenced this action upon the theory that defendant's servant wrongfully appropriated the machine, rendering both liable for damages. The facts stated were undisputed and within the issues made by the pleadings. At the close of the evidence a verdict was directed in plaintiff's favor.

For the appellant there was a brief by *Lyman G. Wheeler,* attorney, and *R. S. Witte,* of counsel, and oral argument by *Mr. Wheeler.*

For the respondent there was a brief by *Richberg & Richberg* and *Erich C. Stern,* attorneys, and *R. D. Stevenson,* of counsel, and oral argument by *Mr. Stevenson.*

The following opinions were filed April 3, 1912:

MARSHALL, J. At first impulse one might say that, in the circumstances of this case, the plaintiff ought to recover. A hasty decision might so lead. That is evident from the summary manner of the disposition below. However, upon reflection it would occur, as it seems, that the case is to be ruled by settled principles, not by mere impulsive thought as to what is right and what is wrong. Further thought and it would occur that the law as to such a situation must have been settled along reasonable and practicable lines, consistent with the necessary relations of members of a community to each other.

There must be masters and servants. One cannot do everything directly. He must needs employ assistants. That is expected by every one to whom he owes a duty, contractual or otherwise, as regards safety of persons or property. How far does that duty extend? Does it extend so far as to make every act of the servant while in the employ of the master, whether done by actual or implied direction or assent of the master,—for the servant's personal negligences and torts attributable to

his own purpose, as well as those occurring by excessiveness in doing what he is employed to do, imputable to the master? If so, then the master must to all intents and purposes, be an insurer against conduct of his servant and under a very great risk from which he has no practicable way of escape by any degree of care he can personally exercise. The only way of escape would be to restrict his activities to his personal capacity. The learned trial court evidently went to the fullest extent of liability we have indicated.

The case presents these aspects: (1) What was the real scope of Flynn's employment? (2) Did it effectually terminate when he left the garage for his lunch so that when he returned with his friend, he did so rather as a stranger than an employee, though having opportunity by reason of his service to enter the garage? (3) Was he actually in the service of the defendant in charge of the garage at the time he took out the machine? That he had no authority from the master to take it out; that his act was not, even remotely, connected with anything he was authorized to do; that it was something neither authorized nor within reasonable anticipation from the standpoint of the master; and that it was something any other lawless person might as well have done had he only possessed the easy means of entering the garage,—are not in dispute.

As we proceed with the case, it will be observed that whichever of the suggested situations may be the real one as to the facts, the legal result is substantially the same. It may be that the learned court below did not think otherwise; but whether a right result was reached is another thing. It may have been thought that the fact of Flynn having rightful access to the garage, regardless of any actual wrongful conduct on the part of appellant either in employing or retaining him, was sufficient. If not so thought, then the case went upon the idea of absolute responsibility for the conduct of Flynn while he was in charge of the garage. The vital contest below on the facts, as counsel viewed the matter, seems to have

been as to whether Flynn was in charge of the garage when he took out the machine, or had practically left for the night and returned as a stranger, merely having means of making an entry without being a trespasser. The situation is presented in much the same way here. The real vital point in the matter, as we shall see, did not receive much, if any, attention.

From the foregoing, familiar and elementary as the law is in general, applicable to the responsibility of a master for the acts of his servants, either as regards the subject of a bailment for hire, as in this case, or otherwise, it seems best to refer thereto at some length. A branch of the law, however familiar, as it may seem to some, which has led to such divergence of thought between counsel and court, as here, may well be treated with some particularity.

In the first place, the liability of appellant, whatever be the choice of aspects as to the facts, as before indicated, rests on breach of mere contract or other duty to respondent. Therefore the inquiry must first be, What are those duties?

The duties referred to are the same in case of a bailment, as here, as in that of any other bailment for hire, except in such special relations as characterize the business of innkeepers, common carriers, and possibly some other vocations, which, in the whole, form a class quite apart from the ordinary. Berry, Law of Automobiles, § 207; Babbitt, Law of Motor Vehicles, § 639. A bailee for hire owes to the bailor the duty to exercise ordinary care as regards the subject of the bailment. That is all. Edwards, Bailments (3d ed.) § 4; 3 Am. & Eng. Ency. of Law (2d ed.) 747; Jones, Bailments, 86. Such is the rule it is said "by the harmonious consent of nations."

All agree that the ordinary bailee is in no sense an insurer. Story, Bailments (9th ed.) §§ 25–32; Schouler, Bailments, 25; Berry and Babbitt, *supra*.

The text on the subject under discussion is without substan-

tial variation in the many standard works at hand. It is quite as old, at least, as English law. It is supported by numerous adjudications, including our own. *Dimmick v. M. & St. P. R. Co.* 18 Wis. 471; *Savage v. Davis,* 18 Wis. 608; *Stacy v. Knickerbocker Ice Co.* 84 Wis. 614, 54 N. W. 1091. A bailee for hire, said the court in *Dimmick v. M. & St. P. R. Co.,* "should exercise that care which men of common prudence generally bestow upon their own property similarly situated, and is only liable in case of failure to perform this duty." That rule is found stated as often as any in the law, emphasis being frequently put upon the fact that a bailee is not an insurer.

Thus it is of the utmost importance here to keep in mind, absence from a contract of bailment of any element of insurance, presence of the element of responsibility for ordinary care, and presence of the element of consent, in the absence of any special agreement to the contrary, to use the usual means of executing the contract of bailment, particularly to do it by the employment of others and without occupying the status of an assurer for their conduct. Ordinary care as to them is the same as in the selection and retention of servants to perform any other service. There is absolutely no difference in principle or authority, so far as regards wrongful acts of the servants being attributable directly to fault of the master. Ordinary care in the selection and retention of employees, ordinary care on the part of employees in doing the things they are employed to do, ordinary care at all points, no more and no less, is the standard contracted for in the ordinary bailment for compensation as in this case. No exceptions are found in the law. It is stated in the books, old and new, that the bailee can only be held responsible for such care. That includes, imputable fault,—wrongful acts within the scope of the employee's employment. This last element is of controlling significance here as we shall see.

Though it will be found stated in the books that the bailee can only be held responsible for the use of ordinary care and common prudence in the preservation of property bailed, cases may be found supporting the view that when the bailee intrusts his duties to an employee, thus affording the latter opportunity to misuse the subject of the bailment, the act of the servant in so doing is imputable to the master, as was thought below in this case. Research, however, will readily disclose that such adjudications are few, incidental, inconsiderate, and have been overruled whenever directly and vigorously challenged. Several illustrations of this are found in the English reports to which American courts have commonly resorted for guidance on this subject.

For example of the foregoing: In *Sleath v. Wilson,* 9 Car. & P. 607, ERSKINE, J., said:

"But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. . . . The master, in such a case, will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it."

That is the logic upon which the judgment here rests, in one aspect of the matter.

In *Storey v. Ashton,* L. R. 4 Q. B. 476, the quoted language was condemned as out of harmony with settled law. The contrary doctrine applied in *Mitchell v. Crassweller,* 13 C. B. 237, was approved, the court saying:

"The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment."

The doctrine above stated is found universally adopted in England and this country. It is stated by text-writers as not admitting of any exceptions as regards ordinary bailments.

This excerpt from Edwards on Bailments (3d ed.) § 389, is a good illustrative example and will be found quoted and approved in many adjudications:

"The general rule is now well settled that the master is liable for all the acts of his servant which are within the general scope of his employment and which are done while engaged in his master's business and with a view to the furtherance of that business and the master's interests, whether such acts are done negligently, wantonly, or even wilfully. But if the servant goes outside his employment, and, without regard to his service, acting with malice or in order to effect some purpose of his own, wantonly causes damage to another, the master is not liable. . . . The rule is perfectly plain and well settled; and the only difficulty in its application is generally one of fact, namely this, to ascertain the true relation in which the parties stood to each other."

That is, as explained, whether the act was done, not within the course or period, but within the scope of the employment.

For another example we quote from Mechem on Agency, § 737:

"If the agent or servant, therefore, steps outside of his employment to do some act for himself, not connected with his principal's business, the latter will not be liable for the agent's negligence while so engaged. Beyond the scope of his employment the agent or servant is as much a stranger to his principal as though he were a third person."

And again from Story on Bailments (9th ed.) § 402, as to the precise relations under consideration:

"The master is not universally liable for the misdeeds of his servants; and, therefore, we are to distinguish whether the act complained of has been done in the service of the master, or in obedience to his orders, or not . . . ,"—done in the service of the master, as the author shows,—for the purpose of serving the master. "The master is not responsible for any wilful or malicious injury done by his servant" unless done "in the master's service in the course of his employment."

That is, as explained by illustrations, in doing the thing he was employed to do.

The doctrine thus stated, it will be observed, applies particularly to the general contract of bailment where the employer uses servants in the execution of the agreement. It is general in all situations where the relation of master and servant exists. It has been repeatedly sanctioned and applied in this court,—in the whole covering a variety of situations. *Winkler v. Fisher,* 95 Wis. 355, 70 N. W. 477; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276; *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658; *Topolewski v. Plankinton P. Co.* 143 Wis. 52, 126 N. W. 554.

Many authorities bearing on the subject are found elsewhere, and among them instances involving substantially similar situations as the one before us,—so far identical as to leave no room for distinguishment on principle. Among them are the following: *White v. Comm. Nat. Bank,* 4 Brewst. 234; *Sanderson v. Collins,* 90 L. T. Rep. 243; *Ellis v. Turner,* 8 Term Rep. 531; *Coleman v. Riches,* 16 C. B. 104; *Rayner v. Mitchell,* L. R. 2 C. P. Div. 357; *Mechanics' Bank v. Bank of Columbia,* 5 Wheat. 326; *Foster v. Essex Bank,* 17 Mass. 479; *Adams v. Cost,* 62 Md. 264; *Maddox v. Brown,* 71 Me. 432; *Merchants Nat. Bank v. Guilmartin,* 88 Ga. 797, 15 S. E. 831; *Cavanagh v. Dinsmore,* 12 Hun, 465; *Stone v. Hills,* 45 Conn. 44; *Evans v. Dyke A. Co.* 121 Mo. App. 266, 101 S. W. 1132.

Those cases, and many others representing all jurisdictions which might be cited, show that the test as to whether a servant in doing a wrongful act was in the employ of the master, and as such in charge of a bank, or a warehouse or repair shop, garage, or handling his master's team, or performing other service in which the master, in case of the act being his own,

would be responsible for misconduct to another injured in his person or property by the act of the servant, is whether the particular act was within the scope of the employment. It matters not whether the master authorized the particular wrongful acts, if the unauthorized matter was merely a wrong way of doing the thing the servant was employed to do,—that is, was in pursuit of the employment itself,—within the scope of it, the master is liable; but if it was something entirely outside of such scope, though done within the period of employment and while actually employed, and capacity to do it was obtained through the service, the master is not liable.

A leading case is *Foster v. Essex Bank, supra.* There the whole subject is discussed at length, many English authorities being cited and reviewed. The general effect is that if the servant of a banking corporation in charge of the bank,—one employed and retained with due care, negligently or fraudulently causes a customer to lose a special deposit left in care of the bank, the corporation is not liable. *Finucane v. Small,* 1 Esp. 315, was cited and approved. There a person stored his trunk and contents with another for hire. The latter's servant stole the contents. Held that the master was not liable. Summing up the result of the authorities the court said, in the *Foster Case:*

"To make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and if he step outside of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innkeepers, common carriers, and perhaps shipmasters or seamen, when goods are in bailment, are exceptions on grounds of public policy."

Merchants Nat. Bank v. Guilmartin, supra, is another case involving the question of whether a bank is liable for the theft of a special deposit by its cashier in charge. True, this case, as the former and each of several others cited therein of similar import, involved a bailment without compensation, where

the degree of care contracted for was only such as a bailee uses in his own business. But they are directly to the point that, in such extreme cases as the theft of a deposit, the question of the bailee's liability turned wholly on whether he exercised the proper degree of care or not,—such degree, as to whether ordinary or something less, being determinable on whether the bailment was for compensation or not. The idea of absolute responsibility for the act of the servant, as if done by the master, or liability at all, except based on some fault as regards trusting the bailment to the control of the servant; imputable fault,—a wrong committed by the servant by actual or constructive assent of the master, was repudiated. The mere custodianship as distinguished from bailment for compensation, was not recognized as varying the rule that a master is not liable, absolutely, for the act of his servant. In any event, the court held, for liability, the wrongful act must be attributable to some negligence of the master, or some negligence or some other fault of the servant in doing the act the master employed him to do. We quote:

"A master is not liable for the servant's fraud or wilful tort unless he is acting in the conduct of his business, that is at his actual or implied instance. The servant must, in the wrongful act, be acting or intending to act in behalf of the master and in the course of his employment."

Evans v. Dyke A. Co., supra, is interesting on the subject under discussion. Plaintiff, owner of an automobile, by arrangement with B., the defendant, proprietor of a garage, sent C., his brother, with the machine to the garage for sale. He found plaintiff's servant, E., in charge. E., in the absence of the proprietor, had authority to receive machines and look after the business. He directed C. to run the machine into the garage. After some conversation respecting the sale price, E. said the machine could readily be sold; that the garage would not be open the next day, Sunday, but as they lived in the same neighborhood, if he, C., would take the ma-

chine back he, E., would call for it the next morning and show it to a proposed customer. That was agreed to. E. called accordingly. The machine was delivered to him and received, ostensibly, for the employer, B. Pursuant to his agency employment, E. showed the machine to a prospective purchaser, and then, instead of returning it to A. or taking it to the garage, went on a pleasure trip during which it was wrecked. The case was treated in various aspects, one upon the theory that E. actually received the machine as agent for B., and while having it as such, with the duty to return it to A. or take it to the garage, after displaying it to the prospective purchaser, turned aside and went on the pleasure ride. In that aspect, the court thus discoursed in general effect: A master is responsible for the negligent and wilful tort of his servant only when committed in the sphere of the servant's duty and while acting in the master's behalf. On principle and authority the automobile company is not liable for the negligence of its agent while he was using the machine for a purpose wholly detached from his employment. The agent's trip had no relation to his service as an employee of the company, and the latter's immunity from liability is settled by many decisions given on similar facts.

One more illustrative case, out of the many at hand, will certainly suffice to emphasize the text quoted from Edwards on Bailments, and the declaration here, that the master's liability for acts of his servants, is governed by precisely the same principle as was declared in *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276, and other cases decided by this court.

In *Sanderson v. Collins,* 90 L. T. Rep. 243, the facts were much like those in *Evans v. Dyke A. Co., supra.* A vehicle, called a dog cart, was intrusted to defendant for his temporary use for a consideration. When not in service it was kept in his coach house under lock and key and the key was usually in the hall of his dwelling house. He took the cart out for a drive. Upon the return it was the servant's duty to put it in

the coach house in the secure manner indicated. Either he failed to do so, or after performing his duty removed the cart to the outside without the master's knowledge or consent, and then, wrongfully and tortiously, went for a pleasure ride and damaged the vehicle. The master was held liable for the act of the servant in the trial court, though it was decided that the servant's act was not within the scope of his authority. The recovery was placed on about the ground upon which the judgment here complained of, seemingly, was rendered. On appeal, the decision was condemned because of there being no liability for the act of a servant while entirely aside from his authority, as distinguished from a wrong committed in doing the very act he is authorized to do. Said the writer of the leading of three harmonious opinions:

"It seems to me that the first thing is to clear one's mind as to the facts of the relations existing beween the defendant and his servant. The obligation of the defendant as bailee was only to take reasonable care of the thing bailed, and he is bound in that respect for an act of his servant done in the course of his employment. But his obligation does not extend to cover the acts of his servant beyond the scope of his authority. If the thing had been taken by a burglar or a stranger without negligence on the part of defendant, he would not be liable. Here the taking was not by a burglar or a stranger, but it was the act of a person as much outside any authority conferred on him as if it had been done by a stranger. The defendant had employed a competent servant and given him proper directions. The defendant was not guilty of any negligence. Therefore there was no want of care on the part of the defendant. I think he is not liable."

Romer, L. J., added, substantially: There was no obligation of insurable safety of the dog cart. Defendant was not, himself, guilty of any negligence. The servant was not acting in the line of his employment by defendant in taking out the dog cart. That being so, the latter is not liable.

It will be observed that, in each of the cases involving the subject under discussion, decided by this court, save one which

we will refer to, specially, later, liability of the master turned on whether the act of the servant was a mere wrongful performance of what he was employed to do, and so within the scope of his authority, within the cited illustrations, or whether it was wholly for a purpose of his own, though done during the period of employment and of his being on duty.

In *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276, the question was whether the floorwalker in defendant's store did the act within the scope of his employment to discover and prevent shoplifting, or did it to extort money from the customer. For failure to observe the suggested test of liability and error in supposing that the rule in such cases as *Craker v. C. & N. W. R. Co.* 36 Wis. 657, applied, the judgment below was reversed.

In *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424, the question was whether the servant merely went too far in executing his commission to discover persons guilty of abusing or stealing from cars, or, in personal revenge, arrested, unlawfully, and abused plaintiff. The instructions were criticised, but, as a whole, found without harmful error because the jury were emphatically informed that defendant was not liable unless the servant's wrongful act was committed in doing, in general, the very thing he was employed to do.

In *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304, the question was whether the bartender assaulted plaintiff for revenge, or to coerce him into paying a bar bill owing to the master. The court said that only in case of the latter was the master liable; that liability depended upon the principle of *respondeat superior;* and that *Craker v. C. & N. W. R. Co.* 36 Wis. 657, and *Fick v. C. & N. W. R. Co.* 68 Wis. 469, 32 N. W. 527, ruled by the special duty of a carrier of passengers to protect them, had no application.

In *Winkler v. Fisher,* 95 Wis. 355, 70 N. W. 477, the question was whether the son, who was out with a gun by his father's permission, was on a hunting expedition for personal pleasure, or in the employ of his father to protect the farm

from crows. If he had left the farm and so gone beyond the scope of his authority, and perpetrated the negligent act in doing a thing he was not, upon any theory, employed to do, then it was said, the father was not liable.

In *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658, the question was whether the defendant's servant assaulted the boy in performance of his duty to protect its cars. The servant had such protection within the scope of his employment at the time of the assault. The test of liability of the master applied below and approved here was whether the assault was committed for the purpose of protecting the property. Other cases might be referred to of the same tenor.

Craker v. C. & N. W. R. Co. 36 Wis. 657, is cited and quoted from by counsel for respondent here at considerable length. If the rule thereof, to the limit, were applicable to such cases as this, counsel's confidence in the judgment would be well grounded. Doubtless the learned trial court was guided by the strict rule. For the particular class of situations to which the case belongs, the doctrine that the wrongful act must be strictly within the scope of the servant's authority to render the master liable, was repudiated, it being held that commission in the course of the employment is sufficient. That is, it was held that a railway company is practically an insurer of the personal security of passengers on its trains against wrongful acts of its employees. That such doctrine was rather novel, even as to the particular situations, must be confessed. As indicated in *Bergman v. Hendrickson, supra,* it did not go upon the doctrine of *respondeat superior.* It has not been extended beyond the particular field, nor was there any significant attempt to do so till *Cobb v. Simon, supra,* where it was followed in the court below as regards the duty of a store proprietor to his patrons. The judgment was reversed, this court saying:

The rule applied below would be proper in case of an assault by a railroad train brakeman upon a passenger as in *Craker v. C. & N. W. R. Co.* "It has not, however, been applied to a

merchant in his relations to customers" to whom he owes only the duty of ordinary care for their safety. Therefore it was error to instruct the jury generally that "a master is liable for a wrong done by his servant, whether through negligence or malice of the latter, in the course of an employment in which the servant is engaged to perform a duty which the master owes to the person injured,"—wrong because the language was susceptible of the meaning that the test of liability was whether the wrongful act was done within the mere course or period of the servant's authority. Whereas the true rule is whether it was done within the scope of the servant's authority, a wrong in doing the very act the servant is employed to do,—not one done by stepping aside from the scope thereof, "for the accomplishment of his own purposes,"—"not whether done during the existence of the employment but whether done in the prosecution of the master's business."

How very unlike this is the drastic rule of the *Craker Case,* appropriate though that may be in its proper field! While in some text-books the emphatic language of RYAN, C. J., in such case is referred to with more or less approval, the rule, in general, universally maintained is, as before indicated.

Thus in Mechem on Agency, § 741, after reviewing the *Craker Case,* it was said:

"It does not, by any means, follow from this rule that the principal is liable for *any* wilful and malicious act of his agent, but only for those which are committed by the agent while acting in the course of his employment and within the scope of his authority. At the same time it is not to be inferred that the principal's liability depends upon whether he has or has not intentionally authorized the doing of the wrongful act. . . . But what is meant, is, that if the agent, while engaged in doing something he is authorized to do, and while acting in the execution of his authority," commits the wrong, the master is liable. But if "the agent steps aside from his employment to do some act having no connection with the principal's business, and to which he is inspired by pure personal and private malice or ill will, the master is not liable."

It should be noted that the author, while adding to the term "course of his employment" the term "and within the scope of

his authority," did not appreciate that without such addition the former term had been used to characterize a liability, regardless of the ordinary conception of the doctrine of *respondeat superior,*—one applicable to a special class of cases, and that the two terms joined as one, or the latter used by itself, accurately expresses the general rule dependable on such doctrine, as this court has, at least twice before, pointed out.

In connection with the foregoing it must be appreciated that the element of stepping aside, commonly found in the rule, does not require any particular period of cessation from the business or going away from the place thereof. A mental attitude of stepping aside, even momentarily,—turning the attention to the accomplishment of a purpose solely outside of that of promoting the object of the employment, effectually breaks the connection between the servant and the master,—leaves no "nexus" between them, as said in the authorities, vital to the latter's liability.

Perhaps far too much labor has already been spent upon this case but we hesitate to lay it down, notwithstanding the principles governing it seem few, plain, and to have been many times declared and applied here, since the particular situation is one that in modern life with its temptations, inviting opportunities to transgress, is liable frequently to arise. The peculiarity of conditions *in præsenti,* gives no warrant for the court to change the ordinary rules established, in effect, as the written law, governing the relation between bailee and bailor, or either, to third persons. A bailment is a bailment whether the subject be a package delivered to a bank for safe keeping, or a horse delivered to a livery-stable keeper for care, a vehicle delivered to a repairer for his trade, or an automobile delivered to a garage keeper to be stabled. An old principle is merely to be extended to new situations. That is all. It has ample unapplied capacity of expansion to satisfy all exigencies of the general class which called it into existence. It

cannot be properly expanded to the extent of sacrificing its essential foundation element, notwithstanding the new and significant opportunities for mischief. The owner of an automobile can easily protect himself, in greater degree, by special contract if he sees fit, or the legislature can make a new rule to fit the new phase of things.

We have thought to treat the case upon principle, more than authority, without searching widely for cases of the particular kind. It were better to adhere, consistently, to a code of principles than to strive to build up or promote one of mere case law. If we were to go into the latter field there would be no dearth of precedents, at least, quite like *Sanderson v. Collins* (90 L. T. Rep. 243) and *Evans v. Dyke A. Co.* (121 Mo. App. 266, 101 S. W. 1132), already cited.

That the liability of a garage keeper for the safety of an automobile intrusted to him, is the same as the keeper of an ordinary stable for a horse or carriage likewise intrusted, and that he is, in no sense, an insurer, is commonly declared as, on principle, must be the case. Babbitt, Law of Motor Vehicles, §§ 637–641; Berry, Law of Automobiles, § 207 and cases cited, particularly *Ford M. Co. v. Osburn,* 140 Ill. App. 633.

The mist surrounding this case readily lifts when it is examined in the light of the foregoing, and the real logic of the master's liability for acts of his servant is appreciated. There is a duty. It requires exercise of ordinary care. As that may be done directly or indirectly, so it may be breached directly or indirectly. As to the latter, there can be no imputable fault, and hence no liability, *respondeat superior,* outside the scope of the delegated duty. The torts and negligences of an employee in doing the very thing he is directed or employed to do, must be seen apart from those which are entirely separate therefrom. As to the latter, the relation of master and servant does not exist. Mere opportunity, as we have seen by the numerous authorities cited, afforded by the

relation of master and servant, makes no difference, so long as there is no negligence in conferring such opportunity. Nor is a situation where the servant is in charge, as in this instance, differentiated from where he stands in any other relation, in general, to third persons, creating competency to charge his master with his negligence or other wrong doing.

Care is required to appreciate the meaning of "scope of the employment." It is not, as said by the Minnesota court in *Slater v. Advance T. Co.* 97 Minn. 305, 107 N. W. 133, "synonymous with during the period of the employment." But, as indicated in *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658, and *Cobb v. Simon,* 119 Wis. 597, 97 N. W. 276, it signifies "in the actual prosecution of the master's business." For example,—if it were the duty of a night man at a garage to deliver a customer's machine to him at his house upon call therefor, and in responding to such a call, he carelessly or wantonly injured the machine, the wrong would be one within the scope of his employment. The taking out of the machine contrary to the orders of both master and customer, and for a purely personal purpose, is another thing.

Now wherein was there any breach of duty of appellant shown here? The servant, so far as appellant had any reason to suppose, was a proper person to leave in charge of the garage. There was no claim made to the contrary nor any evidence in that regard. The servant did not take the machine out under any authority from the appellant, but in most flagrant violation of it. He would not have exceeded his authority any more certainly had he stolen the subject of the bailment, as in some of the cases cited, or destroyed it in the garage. He was not pretending to act for appellant in any respect, but acted solely for himself. As said, in effect, by PARKER, C. J., in *Foster v. Essex Bank,* 17 Mass. 479: He cannot be considered, in any view, as having acted within the scope of his employment when he committed the villainy and the defendant is no more answerable for such act than he

would be had the servant stolen plaintiff's pocketbook while he was in the garage to take out his machine. It being clear that he had no authority whatever to take out the machine, in the words of YELLOTT, J., in *Adams v. Cost,* 62 Md. 264, 271, "by no process of ratiocination could it be made demonstrable that he was acting under the authority of the defendants. On the contrary, we are irresistibly and logically led to the conclusion that he was then acting independently of that authority, and consequently not within the limits of his assigned employment as the defendants' servant." He wilfully, knowingly did the wrongful act for purposes entirely foreign to his employment. He was not hired to do any such act. How then can it be said that it was done within the scope of his employment?

The result of the foregoing renders it immaterial whether Flynn practically left his service for the day and then returned as a stranger and took out the machine. It seems to be conceded that, if such were the fact, the appellant is not responsible under the extreme rule of *Craker v. C. & N. W. R. Co.* 36 Wis. 657. The learned court perhaps considered that Flynn merely absented himself from the garage for a brief period to get a lunch, intending to return and permanently close the place for the night. The indications are pretty plain that he was through for the day when he went for his lunch; that he had no thought of returning for further service, but merely to obtain his coat; that while so away he met his friend and together they conceived the plan of re-entering the place, primarily, if not solely, for the purpose of committing the trespass. Quite likely the thought of getting the coat occurred because of the necessity or convenience of it in view of the contemplated expedition. That demonstrates how very foreign such trespass was from the scope of Flynn's employment. While it would make no difference with the result, as we view the case, we are inclined to hold that Flynn returned to the garage for the machine,—for an unlawful purpose,

formed after he had substantially quit service for the day, and so his act was outside the scope of his employment, even from respondent's viewpoint. The mere fact that he possessed the means of re-entering the garage, would not make the entry within the scope of his employment, if the purpose of such entry was to commit the trespass, or even to get the coat, especially if that was merely incidental to the scheme to commit the wrong.

Little time need be spent with the contention of appellant that the scope of Flynn's employment was confined to washing machines. He was the night man at the garage. That is plain. One of the duties of night men, evidently, is to wash machines. Necessarily, his duties required him to prevent unauthorized interference with machines, to open and close the place as necessary to accommodate customers in taking out or putting them up, and to assist if necessary. The difficulty was that he violated the very purpose of his employment instead of acting within the scope of it, in committing the trespass. It is hard to conceive a more plain case of stepping completely aside from the scope of one's employment, within the rule stated, than occurred in this case.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the case with costs.

KERWIN, J. (*dissenting*). Although the opinion of the court has been extended to great length in the discussion of authorities, it appears to me that the principles involved are few and simple. This seems to be conceded in the opinion. The court says:

"Perhaps far too much labor has already been spent upon this case but we hesitate to lay it down, notwithstanding the principles governing it seem few, plain, and to have been many times declared and applied here. . . ."

The defendant was a bailee for hire, and of course the ordinary rules of law relative to bailees are applicable, hence no

extended citation of authorities would seem necessary. The defendant under the contract for hire was bound at least to use ordinary care to protect the automobile from use by parties other than the owner or persons authorized by the owner to use it. Flynn was the agent of the defendant, charged with the duty of guarding and protecting the subject of bailment, namely, the automobile. At first blush it would strike one as a remarkable doctrine of law which would justify a bailee, who had contracted for hire to care for and protect the property of his bailor, to seek escape from liability because his agent to whom he had intrusted such duty had destroyed the property while charged with the duty his master had delegated to him of protecting it. This seems to be the situation which the case before us presents. It is not denied but that the defendant under his contract with the owner of the automobile owed him the duty of having at the garage when open some one to take care of the car and prevent it from being taken out except at the request of the owner, and to guard it from use by unauthorized persons. At the time in question such duties were intrusted by defendant to Flynn. It is well established law that the defendant here cannot escape liability on the ground of failure of the agent, Flynn, to perform his duty, whether such failure was wilful or the result of negligence or malice. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Stranahan Bros. C. Co. v. Coit,* 55 Ohio St. 398, 45 N. E. 634; Wharton, Agency & Agents, §§ 487, 543; *Bryant v. Rich,* 106 Mass. 180; *McCord v. Western Union T. Co.* 39 Minn. 181, 39 N. W. 315; *Pullman P. C. Co. v. Gavin,* 93 Tenn. 53, 23 S. W. 70; *Richberger v. Am. Exp. Co.* 73 Miss. 161, 18 South. 922; *Jones v. Glass,* 35 N. C. 305.

In the execution of his authority the agent represents his principal, and while so acting the acts of the agent are the acts of the principal, and whatever injuries result to third persons from the manner in which the acts of the agent are

performed are attributable to the principal if the agent be acting in the execution of his general authority to act, that is, in the scope of his employment; but the question as to what acts are within the scope of employment is not always easy of solution. It may, however, be laid down as a general rule that when a duty to a third person is intrusted to the agent by the principal, as between such third person and the principal the principal is liable for failure of the agent to perform. In *Jones v. Glass, supra,* Chief Justice RUFFIN, speaking for the court, said:

"If the defendant would have been thus liable for the act, had it been that of his own hand, he is, as bailee, equally liable for it as the act of one to whose control and management he committed the slaves."

The doctrine is well stated in Wood in his work on Master & Servant, sec. 321:

"In that class of cases where the master owes certain duties either to third persons or the public, whether the same arise from contract or statutory obligations, a different rule of liability exists from that which prevails when the liability sounds entirely in tort. When by contract, or by statute, the master is bound to do certain things, if he intrusts the performance of that duty to another, he becomes absolutely responsible for the *manner* in which the duty is performed, precisely the same as though he himself had performed it, and that without any reference to the question whether the servant was authorized to do the particular act. . . . Where the master, by contract or operation of law, is bound to do certain acts, he cannot excuse himself from liability upon the ground that he has committed that duty to another, and that he never authorized such person to do the particular act. Being bound to do the act, if he does it by another he is treated as having done it by himself, and the fact that his servant or agent acted contrary to his instructions, without his consent, *fraudulently* even, will not excuse him."

If I understand the opinion of the court correctly it is conceded that the defendant is liable if Flynn was acting within

the scope of his duty at the time he took the automobile from the garage. The opinion reads:

"Little time need be spent with the contention of appellant that the scope of Flynn's employment was confined to washing machines. He was the night man at the garage. That is plain. One of the duties of night men, evidently, is to wash machines. Necessarily his duties required him to prevent unauthorized interference with machines, to open and close the place as necessary to accommodate customers in taking out or putting them up, and to assist if necessary. The difficulty was that he violated the very purpose of his employment instead of acting within the scope of it, in committing the trespass. It is hard to conceive a more plain case of stepping completely aside from the scope of one's employment, within the rule stated, than occurred in this case."

The opinion of the court seems to be grounded upon the proposition that the agent, Flynn, stepped aside from the scope of his duty in the circumstances causing the injury, and appears to ignore the proposition of law which makes the principal liable for the acts of the agent in violating the duty of the principal delegated to the agent to perform. An examination of the authorities will show that there is considerable confusion in the books as to when the principal may escape liability for the acts of the agent outside of the scope of his duty, or, more accurately speaking, when the agent is outside the scope of his duty in the particular case. The confusion results from determining upon the facts of each case when the agent is and when he is not acting outside of the scope of his duty. In the case at bar, however, it would seem plain under the authorities heretofore cited, as well as numerous others which might be cited, that no serious question respecting the scope of Flynn's duty arises in this case, because the defendant, being a bailee for hire and bound under his contract to protect the machine, and having delegated that duty to Flynn, was liable for the breach of that duty by him. As

said in *McCord v. Western Union T. Co.* 39 Minn. 181, 183, 184, 39 N. W. 315:

"Where the business with which the agent is intrusted involves a duty owed by the master to the public or third persons, if the agent, while so employed, by his own wrongful act occasions a violation of that duty, or an injury to the person interested in its faithful performance by or on behalf of the master, the master is liable for the breach of it, whether it be founded in contract or be a common-law duty growing out of the relations of the parties. 1 Shearm. & Redf. Neg. (4th ed.) §§ 149, 150, 154; Taylor, Corp. (2d ed.) § 145."

In the case at bar it would seem plain that since the agent, Flynn, was bound to protect the car, the master could not escape liability because the agent violated such duty. To step aside from duty means more than to commit a tort within it. No one would claim but that the bailee himself would be liable had he done the acts complained of here. And it is settled in this state and many others, and is not disputed in the majority opinion, as I understand it, that the agent, when charged by the bailee with the duty of protecting property, stands in the place of the bailee and his acts are chargeable to the bailee. *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Jones v. Glass,* 35 N. C. 305; Mechem, Agency, § 740; *Milwaukee & M. R. Co. v. Finney,* 10 Wis. 388; *McMahon v. Chicago City R. Co.* 239 Ill. 334, 88 N. E. 223; *Goddard v. G. T. R. Co.* 57 Me. 202; *Birmingham R. & E. Co. v. Baird,* 130 Ala. 334, 30 South. 456; *Dickson v. Waldron,* 135 Ind. 507, 34 N. E. 506, 35 N. E. 1; *Brooks v. Jennings Co. A. J. S. Asso.* 35 Ind. App. 221, 73 N. E. 951; *Bryant v. Rich,* 106 Mass. 180; *Richberger v. Am. Exp. Co.* 73 Miss. 161, 18 South. 922; *Pullman P. C. Co. v. Gavin,* 93 Tenn. 53, 23 S. W. 70; *Williams v. Brooklyn D. T. Co.* 12 Misc. 565, 33 N. Y. Supp. 849; *McCord v. Western Union T. Co.* 39 Minn. 181, 39 N. W. 315; *Campbell v. Pullman P. C. Co.* 42 Fed. 484; *Barrow S. S. Co. v. Kane,* 88 Fed. 197; *Houston & T. C. R. Co.*

v. Bush (Tex.) 133 S. W. 245; note 4 L. R. A. N. S. 485; *Stranahan Bros. C. Co. v. Coit,* 55 Ohio St. 398, 45 N. E. 634; *Bergman v. Hendrickson,* 106 Wis. 434, 82 N. W. 304; *Johnston v. C., St. P., M. & O. R. Co.* 130 Wis. 492, 110 N. W. 424; *Schultz v. La Crosse City R. Co.* 133 Wis. 420, 113 N. W. 658.

The scope of the agent's duty has reference to the proper care, protection, and preservation of the property intrusted to him, and when he violates that duty and damage results therefrom to the property the master is liable.

In *Craker v. C. & N. W. R. Co.* 36 Wis. 657, the conductor committed a tort in assaulting a passenger, and his act was contrary to his duty under the contract of carriage, which was to exercise a high degree of care in protecting passengers. The court said:

"But we need not pursue the subject. For, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences."

On the question of turning aside from duty there is no difference in principle between the *Craker Case* and the instant case. The fact that a higher degree of care is due from a common carrier than from an ordinary bailee for hire does not change the rule as to scope of duty. In each case it is a tort

or disregard of duty committed in the line of duty. In the one case the agent's duty was to protect the passenger, in the other the property. In each case the agent was within the line of his duty, but, disregarding it, violated the express contract which he was bound to perform.

In my opinion the *Craker Case* governs the instant case, and the rule of that case is supported by the great weight of authority, as shown by the cases heretofore cited and many others. The doctrine of the *Craker Case* has been repeatedly referred to and approved by this court. *Bergman v. Hendrickson, supra; Johnston v. C., St. P., M. & O. R. Co., supra; Schultz v. La Crosse City R. Co., supra;* and many other cases in this court.

In *Dickson v. Waldron,* 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, the duty of the agent was to preserve order and to remove offensive patrons or guests, and it was held that where the servant unjustly attacks and injures an offensive patron the master is liable.

In *Richberger v. Am. Exp. Co.* 73 Miss. 161, 18 South. 922, the rule is discussed respecting the change from the old doctrine that the master was never liable for the wilful or malicious act of his servant and the rule laid down that the true test of liability now rests upon whether or not the injurious act was done in the course of the master's business.

Stranahan Bros. C. Co. v. Coit, 55 Ohio St. 398, 45 N. E. 634, holds that where the master owes to a third person the performance of some duty and commits the performance of such duty to a servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental, wilful, or the result of negligence or malice.

Pullman P. C. Co. v. Gavin, 93 Tenn. 53, 23 S. W. 70, holds that, while a sleeping-car company is not a common carrier or innkeeper, it is liable for the theft of money of a passenger on the sleeping car by the porter in charge of the car.

McMahon v. Chicago City R. Co. 239 Ill. 334, 88 N. E.

223, holds that while the appellant was a common carrier of passengers it was not an insurer, but was bound to protect passengers from violence, and that if the passenger was assaulted or insulted through the negligence or wilful misconduct of the carrier's servant the carrier is responsible. To the same effect is *Goddard v. G. T. R. Co.* 57 Me. 202.

In *Williams v. Brooklyn D. T. Co.* 12 Misc. 565, 33 N. Y. Supp. 49, the defendant agreed to guard the plaintiff's residence from burglars and thieves during a certain period, and it is held that the defendant could not escape liability for the act of the guard employed in breaking into the house and stealing therefrom, because, the defendant having contracted to perform the duty, when it committed it to another it did so at its peril; that the act of the agent is to be treated as defendant's own act, and it is liable for whatever the agent does, even though done contrary to instructions, wilfully, or fraudulently.

I have no quarrel with the cases cited from this court in the opinion. None of them are out of harmony with the *Craker Case* and some of them strongly support and approve it.

I shall briefly review the principal cases relied upon in the opinion of the court from other jurisdictions.

In *White v. Comm. Nat. Bank,* 4 Brewst. 234, the box of valuables was deposited with the bank as a gratuitous bailment, and it was held that the bank, having used due diligence in keeping the goods, was not liable, although they were stolen. Besides, it appears in the case that the bank received the deposit at the risk of the depositor. Moreover, the case went off on the proposition as to whether the box was lost by any of the officers of the bank while in the discharge of their duties and the degree of care which the law imposes under such circumstances, the court holding that under the circumstances the bailee was liable only for gross negligence.

Foster v. Essex Bank, 17 Mass. 479, is also a case of gratuitous bailment, and it was held that the bank was not liable for stolen goods where due care has been used. The deposit

in this case was kept under the supervision of the depositor, he having the key. It was contended that the deposit was made under contract to keep safely, but it was held that no authority existed to make such contract.

Ellis v. Turner, 8 Term Rep. 531, simply states the general rule to the effect that the master is liable for the acts of the servant in things with respect to his duty, though the master is not answerable for the agent's misconduct in things that do not respect his duty to the master.

Coleman v. Riches, 16 C. B. 104, is very remote in its application. The case is one where wilful fraud had been committed in giving a receipt for grain delivered which had not been delivered.

Adams v. Cost, 62 Md. 264, is a case where a person placed his mare at livery and instructed the servant of the proprietor to take her out for exercise, which was no part of the contract of livery, and while the servant had her out for such purpose she died. Held, and very properly of course, that the proprietor of the stable was not liable though the mare died in consequence of the immoderate riding and carelessness of the servant.

Maddox v. Brown, 71 Me. 432, is a case where a son, in the absence of his father and without his knowledge, took his father's horse and carriage, left the horse unfastened, and it being frightened ran away, and the carriage collided with the plaintiff's and injured it. Held, that the father was not liable.

Merchants Nat. Bank v. Guilmartin, 88 Ga. 797, 15 S. E. 831, is a case of gratuitous bailment. The deposit was received at the bank through its cashier and the cashier stole the deposit. Held, that the bank, having used that degree of diligence which the law required under the bailment, was not liable. In this case the court said (page 801):

"The custody of the deposit implies no act to be done, but only a mere continuance of possession until a return of the

property is demanded. The cashier had nothing to do about it except suffer it to remain in a safe place of deposit. Consequently in taking it to himself he is said to 'step aside' from his employment to do an act for his personal gain, regardless of the business for which he was engaged."

Cavanagh v. Dinsmore, 12 Hun, 465, is a case in which the plaintiff's intestate was run over and killed by defendant's truck through the negligence of the driver while pursuing an unauthorized course, and it was held that the driver was not acting in the business of his master at the time of the accident, hence defendant was not liable.

Stone v. Hills, 45 Conn. 44, is also a case where the driver of a team was acting outside of the scope of his duty when the injury occurred, and was held not to be in the employment of the defendant.

Mechanics' Bank v. Bank of Columbia, 5 Wheat. 326, involves the question of liability upon a check signed by the cashier of an incorporated bank.

The two cases mainly relied upon to support the majority opinion are *Evans v. Dyke A. Co.* 121 Mo. App. 266, 101 S. W. 1132, and *Sanderson v. Collins,* 90 L. T. Rep. 243. In *Evans v. Dyke A. Co.* it appears doubtful from the record whether there ever was a delivery to the company, but, even if so, there was no special duty, upon the facts of the case, due from the company to the plaintiff, by special contract or otherwise, to care for or protect the machine. The machine was simply intrusted by Evans to Lemon, agent of the company. It appears from the opinion and the facts stated that the agent used the machine in a capacity wholly detached from his employment.

In *Sanderson v. Collins* it does not appear that the coachman was charged with any duty of caring for or protecting the machine during the night. It appears that when the coach was put in for the night the coach house was locked and the key left with the master or kept in the hall of his house. It

is true that this case approaches more closely the instant case than any other cited in the opinion, but I think it may be distinguished from the case at bar, and, if it cannot be, my opinion is it ought not to be followed.

I think the judgment of the court below should be affirmed.

I am authorized to say that Mr. Justice SIEBECKER and Mr. Justice TIMLIN concur in this dissent.

A motion for a rehearing was denied June 4, 1912.

STATE EX REL. SHELDON, Receiver, Appellant, vs. DAHL, State Treasurer, and another, Respondents.

February 2—June 4, 1912.

State treasurer: Duty as to securities deposited by trust company: Breach of official bond: Action, by whom brought: Corporations: Dissolution: When existence ceases: Pleading: Demurrer: Action, at law or in equity? Statutes changing procedure: Application to pending cases.

1. The duty of the state treasurer, under sec. 1791*e*, Stats. (Supp. 1906: Laws of 1905, ch. 504), to hold in trust the securities or cash deposited by a trust company, for the benefit of the depositors, creditors, and *cestuis que trustent* of such company, is an official duty whose faithful discharge is guaranteed by his official bond.
2. The duty in such case is one owing to individuals, and although the treasurer's bond runs to the state, yet where the attorney general has refused, on the ground that the state has no beneficial interest, to bring an action thereon to recover for breach of said duty, the action may be brought in the name of the state on the relation of the individuals who are beneficially interested.
3. The duty of the state treasurer, under said sec. 1791*e*, is to retain possession of the securities or cash mentioned "at all times *during the existence* of" the trust company; and up to the time

such company ceases to exist the duty is absolute, leaving no room for the exercise of judgment or discretion.

4. Where a corporation proceeds voluntarily to dissolve, its existence within the meaning of said sec. 1791*e* ceases when, but not until, certified copies of the resolution of dissolution have been duly filed and recorded as provided in sec. 1789, Stats. (Supp. 1906: Laws of 1905, ch. 507).

5. Although the absolute duty of the state treasurer to retain possession of the securities or cash deposited by a trust company ceases when, under said sec. 1789, Stats., the dissolution of such company is complete, yet, after that time he is still charged with the duties of a trustee in relation thereto. [Whether after that time he would be protected in case of a negligent surrender of the securities, if he acted in good faith, is not determined.]

6. A statute merely changing the procedure and not affecting any substantial or vested right—in this case sec. 2649*a*, Stats. (Laws of 1911, ch. 354), providing in effect that upon a general demurrer a complaint shall be sufficient if the facts stated entitle plaintiff to any relief, whether legal or equitable—may be applied to a case in the appellate court, though enacted after the decision in the trial court.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Reversed.*

This is an appeal from an order sustaining a demurrer to the complaint. The action is in equity upon the official bond of the defendant *Dahl* as state treasurer, and is brought against *Dahl* and the surety upon the bond. The relator, *Sheldon,* is the receiver of the Wisconsin Savings Loan & Trust Company, a Wisconsin corporation (hereinafter called the Trust Company), appointed by the United States court for the Western district of Wisconsin in a winding-up action, and the other relators are holders of unpaid bonds issued January 6, 1906, by the Wisconsin Blue Grass Land Company, another Wisconsin corporation, which bonds, it is alleged, were underwritten before issuance by the Trust Company. It is alleged by the complaint in substance that the Trust Company contracted with the Land Company, at the time of underwriting the said bonds, that it would receive and col-

lect the securities upon which said bonds were based, consisting of mortgages and land contracts to an amount whose face value should be at least twenty per cent. in excess of the whole issue of bonds, and would pay the said bonds at maturity out of the proceeds of the securities so intrusted to it; that bonds to the amount of $67,000 are now outstanding; that the only securities turned over by the Land Company to the Trust Company under the provisions of said contract consisted of a land contract securing notes to the amount of $46,000 which was not in fact worth to exceed $15,000, and that the same has been dissipated and diverted to other uses by the officers of the Trust Company, leaving the bondholders of the Land Company unpaid. The complaint further sets forth the election of the defendant *Dahl* as state treasurer in November, 1908, and the execution and approval of his official bond with the *National Surety Company* as surety in December, 1908. It is there alleged that in May, 1906, the Trust Company deposited with the then treasurer of the state of Wisconsin approved first mortgages and bonds in the sum of $50,000, as required by sec. 1791*e*, Stats. (Supp. 1906: Laws of 1905, ch. 504), and that on March 1, 1909, the defendant *Dahl* as treasurer held such securities as the statutory deposit under said last named section;

"that on or about the 1st day of March, A. D. 1909, in violation of the rights of these relators, and all other creditors and bondholders similarly situated, and without their knowledge or consent, the said *Andrew H. Dahl* negligently surrendered all of the securities then on deposit with the said state treasurer, except a certain certificate of deposit of Bank of Hudson, No. 6088, dated February 13, 1909, in the sum of $5,000, which said certificate was held by the said *Andrew H. Dahl* as state treasurer and which was negligently surrendered subsequently by the said *Andrew H. Dahl,* on or about the 10th day of April, A. D. 1909. That said surrender was made in violation of the rights of these relators, and all other creditors and bondholders similarly situated, and without their knowledge or consent; that said $45,000 worth of securities were surrendered to Spencer Haven and M. A. Nye, purporting to

represent the said Wisconsin Savings Loan & Trust Company, and that the said *Andrew H. Dahl* received from the said Spencer Haven a receipt, a copy of which is hereto annexed, marked Exhibit I and made a part of this complaint. That said $5,000 certificate of deposit was surrendered to the said Wisconsin Savings Loan & Trust Company, or the officers of the said Wisconsin Savings Loan & Trust Company. That the said *Andrew H. Dahl* surrendered said securities on the presentation to him of an *ex parte* affidavit signed by N. B. Bailey and W. H. Sherman, president and secretary respectively of the said Wisconsin Savings Loan & Trust Company, which said affidavit stated, in substance, that said Trust Company was dissolved; that it had no depositors; that the claims of all its creditors had been adjusted in full, and that it had been released and discharged from all trusts; that it owed no obligations; that its duties and business as a trust company had been fully performed and discharged and nothing remained to be done in the winding up of its affairs except a division of its assets among its stockholders; that all of the statements contained in said affidavit were false, and said *Andrew H. Dahl* would have ascertained that such statements were false had he made an investigation of the books and records of said Wisconsin Savings Loan & Trust Company or of the records in the office of the commissioner of banking of the state of Wisconsin, or had he made an investigation of the affairs of said Trust Company, or the affairs of the said Northern Blue Grass Land Company, or had he made any investigation, such as a reasonably prudent man would have done under like circumstances; that said *Andrew H. Dahl* made no investigation as to the truth of any of the matters contained in said affidavit, or any inquiry from the sources aforesaid or any other source; that after the surrender of $45,000 worth of securities, as aforesaid, said *Dahl* was informed that the statements contained in said affidavit were false; that thereafter said *Dahl* made no effort to secure the return of the securities already surrendered by him, nor any further inquiry as to the truth of the statements contained in said affidavit, or as to the affairs of the said Trust Company, but thereafter negligently and carelessly surrendered the remaining $5,000 in securities, as aforesaid; that in surrendering said securities said *Andrew H. Dahl* did not act as an ordinarily prudent per-

son would have acted under similar circumstances in the conduct of affairs of like magnitude and importance, and acted contrary to the advice of the commissioner of banking of the state of Wisconsin, whose duty it is by law to pass upon and approve the deposit of such securities, and acted contrary to the uses and practice which had been followed by officers of the state of Wisconsin in surrendering securities deposited with them, of which said practice said *Andrew H. Dahl* had knowledge."

The complaint further alleges that on said March 1, 1909, claims had been filed and allowed against said Trust Company, including claims founded on the bonds of the Land Company, to the amount of $137,417.05; that the assets of said Trust Company which have come to the hands or knowledge of the receiver do not exceed $5,000 in value; that the Land Company is insolvent; that the state treasurer has refused to account for the securities so deposited; and that the attorney general upon request has refused to institute an action in the name of the state. Judgment is demanded for an accounting of the securities so wrongfully surrendered, that all the creditors of the Trust Company and the bondholders of the Land Company be ascertained and interpleaded, and that the defendants be required to pay to the relator, *Sheldon,* a sufficient sum to pay said claims and costs.

Upon the argument in this court it was stipulated that a certified copy of the resolution of dissolution of the Trust Company, together with certificates showing the respective dates on which the same was filed in the office of the register of deeds of St. Croix county and in the office of the secretary of state, might be filed in this court and considered as though the same were fully alleged in the complaint. It appears by the papers subsequently filed in pursuance of this stipulation that a resolution of dissolution as required by sec. 1789, Stats. (Supp. 1906: Laws of 1905, ch. 507), was adopted by the stockholders of said corporation March 10, 1908, and that a copy thereof duly certified was filed in the office of the secre-

tary of state March 1, 1909, and recorded in the office of the register of deeds of St. Croix county March 2, 1909.

For the appellant there was a brief by *Richmond, Jackman & Swansen,* attorneys, and *Young & Stone* and *Sanborn & Blake,* of counsel, and oral argument by *S. T. Swansen* and *John B. Sanborn.*

For the respondent *Dahl* there was a brief by *Jones & Schubring,* and for the respondent *National Surety Company* a brief by *Miller, Mack & Fairchild;* and the cause was argued orally by *B. W. Jones* and *James B. Blake.*

The following opinion was filed April 3, 1912:

WINSLOW, C. J. Sec. 1791*e,* Stats., as amended by ch. 504, Laws of 1905, requires every trust company to deposit with the state treasurer not less than fifty per centum of its capital stock, nor more than $100,000 in cash, bonds, or first-mortgage securities on real estate, which "shall be held by the state treasurer in trust as security for the depositors and creditors of said corporation, and for the faithful execution of any trust which may be lawfully imposed upon and accepted by it." The section further provides that the securities may be from time to time withdrawn, "provided that securities or cash of the amount and value required by this section shall at all times *during the existence* of such corporation remain in the possession of the state treasurer for the purpose aforesaid."

These provisions unquestionably make it the official duty of the state treasurer to hold the securities or cash so deposited in trust, the beneficiaries of which trust are the depositors, creditors, and *cestuis que trustent* of the trust company. The treasurer's official bond upon which this action is brought runs to the state as obligee and is conditioned not only for the faithful discharge of the duties of his office, but also for the delivery to his successor in office, *or to any other persons au-*

thorized by law to receive the same, of all moneys, books, records, papers, and other articles and evidences belonging to said office. The duty to safely keep the securities in question is a duty whose faithful discharge is guaranteed by the bond just as fully as any other official duty. True, it is a duty in which neither the state nor the general public has any direct interest; it is to be performed for the benefit of a class and probably a very limited class of people, but it is none the less an official duty.

The first proposition urged in support of the demurrer is that the action is not brought by the proper parties, but must be brought by the state itself, represented by the attorney general. This objection must be overruled. The promise is made in form to the state, but, so far as this fund is concerned, it is entirely for the beneficial interest of third persons, and those third persons must (if they are to receive the full benefit of the promise) have some way of enforcing its provisions not dependent upon the will of others who have no beneficial interest in the promise. Such bonds running to the state or some public official as obligee, but securing the performance of duties owing only to individuals or classes of individuals, are quite frequent, and the general principle is that in the absence of express statutory provision it will be held that the statutory intent is to grant permission to the individual or class protected by the bond to use the name of the state, or official, as plaintiff in an action brought to recover for breach of such a duty. *Howard v. U. S.* 184 U. S. 676, 22 Sup. Ct. 543. Unquestionably the attorney general could bring the action without relator, and use the name of the state as plaintiff, because the state is for this purpose the trustee of an express trust (*State v. Wettstein,* 64 Wis. 234, 25 N. W. 34); but where, as here, the attorney general has refused, as he doubtless properly may, to bring the action because the state has no beneficial interest in it, there seems no good rea-

son which should prevent the bringing of the action in the name of the obligee on the relation of the parties beneficially interested.

Passing this preliminary question, we come to the merits. The respondents claim and the trial court held that the state treasurer was vested with a discretion or *quasi*-judicial power in deciding when the securities in question should be released, and that the complaint here shows affirmatively that he released the securities upon sworn proof that the company had been dissolved and paid all of its obligations. It is further claimed that the complaint shows that the treasurer's action was taken in good faith, and in the absence of bad faith or intentional malfeasance there can be no recovery.

The difficulty with this contention is that the statute lays down a perfectly certain and definite duty with regard to the custody of the securities up to the time of the dissolution of the corporation. There can be no mistake about the scope of that duty, no room for the exercise of judgment or discretion. The securities are required to remain in the possession of the treasurer for the trust purposes named "at all times during the existence of the corporation." Sec. 1791*e*, Stats. Now if the statute fixes a definite time at which the corporation ceases to exist, there can be no question of doubt under the statute as to the duty of the treasurer previous to that time.

It seems very clear that sec. 1789, Stats., fixes a very definite and certain limit to the existence of a corporation which, as in the present case, desires to voluntarily dissolve. There is no ambiguity or uncertainty in its provisions. The section prescribes the contents and manner of adoption of the resolution of dissolution, and requires a certified copy thereof to be recorded in the office of the register of deeds of the home county of the corporation, and a like copy to be filed in the office of the secretary of state. "Thereupon such corporation shall cease to exist except for winding up its affairs."

The corporation ceases to exist upon the recording and fil-

ing of the certified copies of the resolution and not before, and until that time the duty of the treasurer to keep possession of the securities is absolute. He had no judgment or discretion to exercise. The statute is his sole rule of action.

It now appears definitely that the resolution of dissolution, although filed with the secretary of state on March 1, 1909, was not recorded in the proper register's office until March 2, 1909. No dissolution occurred, therefore, until March 2d. The securities to the amount of $45,000 were released by the treasurer on March 1st,—hence the complaint clearly states a breach of the treasurer's duty as to this sum.

Sec. 1764, Stats. (1898), provides that all corporations which shall be voluntarily dissolved or whose existence shall be terminated in either of several ways named in the section shall continue to exist for three years thereafter for the purpose of prosecuting and defending actions, settling and closing up their business, conveying their property and dividing their capital stock, and for no other purpose. In the consideration of this case we have had some doubt whether it ought not to be held that the corporation exists within the meaning of sec. 1791*e*, *supra*, but we have concluded that it ought not to be so held. It is very evident that the securities may be needed in the closing up of the affairs of the corporation, and, if it were impossible to release them during the three years limited for the closing-up process, the very object sought to be attained by the deposit, namely, the protection and satisfaction of creditors of the corporation, might be seriously impeded and delayed.

The sum of the present holding is that in case of a trust corporation sought to be dissolved by voluntary proceedings under sec. 1789, *supra*, the treasurer's duty to retain the deposited securities is absolute up to the moment when, under the provisions of that section, the dissolution is complete, and after that time the treasurer remains in possession of the securities still charged with the duties of a trustee, but re-

lieved from the absolute mandate to retain possession. During this time if any court having jurisdiction of the subject matter and of the parties directs that the moneys be delivered over to an officer of the court, or to a third party, the treasurer will, of course, be protected in obeying such order; probably he would be protected also in releasing the funds without the order of a court if he act in good faith and exercise reasonable care and diligence. Whether he would be protected if he acted without reasonable care though still in good faith may be a question of some doubt, and inasmuch as it is not absolutely essential to a decision of this case at the present time, we do not decide it. So far as the $45,000 payment is concerned, we hold that a breach of the bond is stated.

The question whether the action should have been brought at law rather than in equity we find it unnecessary to decide. Even if wrongfully brought in equity, the defect can no longer be taken advantage of by general demurrer. Sec. 2649*a*, Stats. (Laws of 1911, ch. 354). While this law was passed since the decision below, we find no difficulty in applying it to the present case, as it merely changes the procedure and affects no substantial or vested right.

By the Court.—Order reversed, and action remanded with directions to overrule the demurrer to the complaint.

VINJE, J., took no part.

A motion for a rehearing was denied June 4, 1912.

FIELD, Respondent, vs. PIER, Appellant.

March 13—June 4, 1912.

Tax titles: Change in county boundaries: Who to execute tax deeds on lands detached: Redemption by minor in favor of his grantee: Payment by check: Waiver: Deeds: Construction: Interest conveyed.

1. In a statute which takes territory from one county and attaches it to another, a provision that all tax certificates held by the former county on lands attached to the latter shall be assigned to the latter, and that the officers of the latter county shall execute tax deeds upon the certificates so assigned, does not apply to tax certificates held by private parties at the time of the change in boundaries.
2. Under sec. 1176, Stats. (1898), the county clerk of the county where the land is sold for taxes is authorized to execute the tax deed, in the absence of any legislative provision to the contrary, even though the land be set off into another county before the tax deed is due.
3. It was adjudged that the survivor of two partners held the title to an undivided half interest in certain land in trust for the firm and that he should convey an undivided half of the firm's interest (*i. e.* a one-fourth interest in the lands) to the administrator of the deceased partner in trust for the heirs at law and creditors of said decedent; also that the survivor pay to such administrator the sum of $3,450.04 and that the same be a lien on the interest of said survivor in said lands. The survivor thereafter conveyed to the heirs of said deceased partner the undivided half of the lands, reciting, among other things, that the deed was given in satisfaction of the judgment and that it was a conveyance of the title held by the grantor. *Held*, that such conveyance was of an undivided half (not merely a fourth) interest in the lands, it being deemed that the grantor conveyed his own interest in satisfaction or part satisfaction of the money which he was adjudged to pay.
4. A minor whose lands have been sold for taxes may redeem the same, within one year after reaching majority, in favor of a grantee to whom he has conveyed them.

5. Where a county clerk accepts and retains a check offered in redemption of land from a tax sale, without objection to the form of payment, and the check is admittedly good though not cashed by the clerk, it is a good redemption. A tender of money is waived by the acceptance and retention of the check under such circumstances.

APPEAL from an order of the circuit court for Iron county: JOHN K. PARISH, Circuit Judge. *Modified and affirmed.*

Action for partition of the following described premises, to wit: the northwest quarter of the northwest quarter and the south half of the northwest quarter of section 28, and the east half of the northwest quarter, the southwest quarter of the northeast quarter, and lot 1 of section 30, all in town 44 north, of range 4 east, situated in the county of Iron, state of Wisconsin. Plaintiff claims an estate in fee to an undivided one-half interest in said lands, and alleges that defendant has a similar interest therein; that the above described lands are all the lands in this state in which the parties to this action own any estate, either jointly or in common; and that, as plaintiff is informed and believes, no other persons have any interest or estate in said lands. The answer of the defendant denies that the parties own or possess the premises described as tenants in common, and denies that plaintiff has any right, title, or interest whatsoever in and to said lands, or in or to any part of them. Defendant further alleges that she is the owner in fee simple of the above described lands and of the whole of each of said lands, and sets out, as the foundation of her title thereto, four tax deeds issued by Oneida county, as follows: (1) May 23, 1892, on the tax sale of 1889, containing three of the above named descriptions of land; (2) April 9, 1895, on the tax sale of 1891, containing all the above described lands; (3) August 29, 1895, on the tax sale of 1892, containing four of the descriptions; and (4) May 14, 1898, on the tax sale of 1893, also containing four of the descriptions, which tax deeds were all duly recorded. The de-

fendant also pleaded the following statutes of limitation: secs. 1187, 1188, 1189*a*, and 1210*h*, Stats.

The action was begun September 26, 1907, and was tried by the court without a jury. The court found that at the commencement of the action the plaintiff held the lands herein described as tenant in common with the defendant and was then the owner in fee simple of an undivided one-half interest therein, and that defendant was then the owner in fee simple of the other undivided one-half interest therein; that the lands are vacant and unoccupied and are covered with timber, which differs greatly in value upon the different descriptions, and that they are so situated that a partition cannot be made without great prejudice to the owners, for the reason that they cannot be divided so as to give an equal value to each without subdividing forty-acre tracts; that they are all the lands which are owned by said parties together, either as tenants in common, joint tenants, or otherwise, within this state; and ordered the lands to be sold and the proceeds paid into court to abide its further order.

The lands were patented by the United States in 1886 to Henry Brinker and Matthew J. Hart; but by a judgment of the circuit court for Ashland county dated the 12th day of February, 1889, wherein John McCarthy, as administrator of the estate of Louis Brinker, deceased, was plaintiff, and Henry Brinker was defendant, it was decreed that Henry Brinker held the title to an undivided one-half interest in the lands in trust for the late firm of Henry Brinker & Brother, composed of Henry Brinker and Louis Brinker. It was in said judgment further adjudged and decreed that Henry Brinker convey to the plaintiff, in trust for the heirs at law and creditors of Louis Brinker, an undivided one-half of the firm's interest in said lands, and it was further adjudged and decreed that the defendant Henry Brinker pay to the plaintiff, as administrator, the sum of $3,450.04, and that the same be a lien on the interest of the defendant in the lots and lands

therein described. The deed of Henry Brinker and wife to Ida, Helen, Flora, and Louis Brinker, dated the 6th day of November, 1889, recites that the grantors, "for and in consideration of the satisfaction of a certain judgment made and entered in the circuit court of Ashland county, wherein John McCarthy, as administrator of the estate of Louis Brinker, is plaintiff, and Henry Brinker is defendant, on the 18th day of February, 1889, in favor of the said plaintiff and against the said defendant, have granted, given, bargained, sold, released, remised, aliened, conveyed, and confirmed" the undivided one-half of the following described lands (describing the lands in question), and it further recites "that these presents are a conveyance of the title held by the said Henry Brinker on the 16th day of June, 1887." In 1903 said Ida, Helen, Flora, and Louis Brinker, and Mary Brinker, widow of Louis Brinker, deceased, conveyed an undivided one-half of said lands to the plaintiff. No redemption has been attempted on the part of the widow, or of the children, Flora, Helen, or Ida Brinker. Said children all became of age more than one year previous to the commencement of the action. Louis Brinker, the youngest, became of age June 22, 1907. In 1905 he left with the county clerk of Oneida county a check for $39.26 for the purpose of redeeming an undivided one-eighth interest in the lands in question from the sales of 1889, 1891, 1892, and 1893. The parties stipulated that from the time such check was left with the clerk until the present there were sufficient funds in the bank upon which it was drawn to meet it. The check was never cashed, nor was any redemption receipt issued. It was, however, retained by the county clerk and was in his possession subsequent to the commencement of this action. On June 19, 1908, Louis Brinker deposited $59.67 in cash with the clerk of Oneida county for the purpose of redeeming an undivided one-half interest in said lands, which, with the proceeds of the check left in 1905, was sufficient in amount to redeem a half interest. The lands

were a portion of Oneida county until April, 1893, when, pursuant to the provisions of ch. 150 of the Laws of 1893, they became a part of Iron county. They have at all times been vacant and unoccupied.

From the order adjudging the title and directing a sale, as above stated, the defendant appealed.

Geo. C. Foster, for the appellant.

For the respondent there were briefs by *Sanborn, Lamoreux & Pray,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. Walmsley.*

The following opinion was filed April 3, 1912:

VINJE, J. If the tax deed issued by Oneida county April 9, 1905, which included all the lands in litigation, is valid, then it follows that the interest owned by Ida, Helen, and Flora Brinker, as well as by the widow, Mary Brinker, is cut off by the statute of limitations running in favor of the grantee in the tax deed, the lands being vacant and unoccupied. And the interest owned by Louis Brinker is also cut off unless a valid redemption has been made by him.

It is contended by the respondent that the tax deed of April 9, 1905, is void because issued by Oneida county on lands which, at the time of the tax sale, were located in Oneida county, but which at the time of the issuance of the tax deed were located in Iron county. In other words, it is claimed that Iron county and not Oneida county should have issued the tax deed.

Ch. 150 of the Laws of 1893, changing the boundaries of Iron county, provides that all tax certificates held by Oneida county on lands attached to Iron county shall on or before the 1st day of September, 1893, be assigned and delivered to the treasurer of said Iron county, and the act further provides that the proper officers of Iron county are authorized to execute tax deeds upon such certificates so assigned, which deeds shall be substantially in the form now prescribed for tax

deeds; but, in addition to the recitals now provided for, deeds which may be executed by said Iron county shall contain a recital of the fact that the certificates were assigned by said Oneida county. The act nowhere provides which county shall issue tax deeds upon certificates held by private parties on lands situated in Oneida county at the time of the tax sale but attached to Iron county before a tax deed could issue. The question, therefore, is, Which county, in the absence of special legislation, was authorized to issue the tax deed on the lands in question for the tax sale of 1891? Was it Oneida county, in which the lands were located at the time they were sold for taxes, or was it Iron county, in which they were located at the time the tax deed was issued. A reference to the legislative policy of the state in the creation of new counties will aid in determining this question.

Ch. 178 of the Laws of 1875 created Taylor county out of territory embraced within the counties of Clark, Marathon, Lincoln, and Chippewa. It made no provision for the issuance of tax deeds upon tax certificates held by private parties. By ch. 69 of the Laws of 1879 the act creating Taylor county was amended so as to authorize the county clerk of Taylor county and make it his duty to execute and deliver to the persons entitled thereto tax deeds upon all lands unredeemed from any tax sale prior to the year 1876 made by either of the counties of Chippewa, Lincoln, Clark, or Marathon and embraced within the territorial limits of Taylor county upon which tax certificates had theretofore been issued by said counties of Chippewa, Lincoln, Marathon, and Clark.

Ch. 103 of the Laws of 1879 created Price county out of territory theretofore embraced within the counties of Chippewa and Lincoln. The act made no provision for the issuance of tax deeds upon tax certificates held by private parties theretofore issued by the counties of Chippewa and Lincoln. But ch. 218 of the Laws of 1880 amended ch. 103 of the Laws

of 1879 so as to authorize the county clerk of Price county and make it his duty to execute and deliver to persons entitled thereto tax deeds upon all lands unredeemed from any tax sale prior to the year 1880 made by either of the counties of Chippewa or Lincoln and embraced within the territorial limits of Price county upon which tax certificates had theretofore been issued by said counties of Chippewa and Lincoln.

Ch. 33 of the Private and Local Laws of 1872 detached certain territory from the county of Jackson and annexed the same to the county of Wood. In 1877 this act was amended by ch. 137 of the laws of that year by authorizing the county clerk of Wood county to execute and deliver to the persons entitled thereto tax deeds upon all lands unredeemed from the tax sales of the years 1871 and 1872 made in Jackson county of the lands described in the act detaching territory from Jackson county and annexing it to Wood county.

Ch. 469 of the Laws of 1901 detached certain territory from the county of Chippewa and created the county of Gates. This act, by sec. 8 thereof, authorized the county clerk of Gates county and made it his duty to execute and deliver to persons entitled thereto tax deeds upon all lands unredeemed from any tax sale prior to the year 1902 made by the county of Chippewa and embraced within the territorial limits of the said county of Gates by which tax-sale certificates had theretofore been issued by said county of Chippewa, or which may thereafter have been issued on sales of land returned and sold previous to the passage, publication, and taking effect of the act.

Ch. 411 of the Laws of 1885 detached certain territory from Lincoln county and created the county of Oneida. The act made no provision for the issuance of tax deeds upon certificates held by private parties, but it authorized the county of Oneida to execute tax deeds upon tax certificates assigned to it by Lincoln county.

Ch. 172 of the Laws of 1883 detached certain territory from Burnett county and created the county of Washburn. Sec. 6 thereof provided:

"All lands heretofore sold for taxes, or that may be sold for the taxes of 1882, situated within said county of Washburn, shall be subject to redemption in, and if not redeemed, advertised and deeded by the county of Burnett."

A more extended search would no doubt disclose similar laws enacted in the creation of other counties, or as amendments thereto; but the above is sufficient to indicate that it has been considered necessary, to enable a new county to issue tax deeds upon certificates issued to private parties by the old county, to secure special legislative authority therefor. True, in the case of the creation of Washburn county out of Burnett it was provided that the old county should issue the tax deeds, but that must be deemed merely declaratory of the law as it existed. The old county alone is interested in the levy and collection of the tax upon which the tax deed is issued in such cases. The proceeds of the sale of the certificates went to it. If a refund were demanded under sec. 1184, Stats. (Laws of 1909, ch. 71), on account of any invalidity therein mentioned as to the certificate or deed, the old county would have to make it. The new county would have no interest in, or authority over, such question of refunding.

Sec. 1165, Stats. (1898), provides that a redemption may be made to the county clerk of the county where the land was sold, indicating that such county is the one that has authority to deal with the whole subject matter, including the execution of a deed if no redemption is made. Great stress is placed by respondent upon the fact that sec. 25 of ch. 22 of the Laws of 1859 provided that, if no redemption of land was made, the county clerk of the county where the same was sold should execute a deed, etc., and that in the Revision of 1878 the words "where the same was sold" were left out. We fail to see any special significance in this omission. Certainly the

county clerk of the county where the lands were sold would be the proper county clerk to execute the deed in the great majority of cases. Only when territory is changed from one county to another could the law apply at all if a change was intended by it. We do not, however, consider that a change in the law was intended further than not to have a specific general statutory provision apparently stand in opposition to the many exceptions which the legislature had made in the creation of new counties, and has since made. Sec. 1176 as it now stands (Stats. 1898) must be construed to mean that the county clerk of the county where the land is sold for taxes is authorized to execute the tax deed in the absence of any legislative provision to the contrary, even though it be set off into another county before the certificates are ripe for a tax deed. Such was its construction prior to the Revision of 1878. *Austin v. Holt,* 32 Wis. 478. See, also, *Haseltine v. Simpson,* 58 Wis. 579, 17 N. W. 332. It follows that the tax deed of April 9, 1905, upon the lands executed by the county clerk of Oneida county is a valid tax deed, and divested the title of the original owners except as it may have been saved by a redemption. That being so, the questions as to the validity of the first tax deed, and as to the application of the various statutes of limitations, become immaterial.

Respondent claims that Louis Brinker has a one-eighth interest in the lands in question, while the appellant argues that he has only a one-sixteenth interest therein. The correctness of the respective claims depends upon whether Henry Brinker and wife conveyed to the minor heirs of Louis Brinker, deceased, a one-half or a one-fourth interest. It is the claim of respondent that only the undivided one-fourth interest of Louis Brinker, deceased, was conveyed by the deed of Henry Brinker and wife given in satisfaction of the judgment referred to in the statement of facts, and that he did not convey his own undivided one-fourth interest. We are unable to concur in this view. The judgment of the circuit court ad-

judged not only that Henry Brinker convey the one-fourth interest of Louis Brinker, deceased, but also that he was indebted to the estate in the sum of $3,450.04, and the deed recites that it is given in satisfaction of the judgment, and is a conveyance of the title held by the grantor—not a conveyance of the title held in trust by him. It must be deemed he conveyed his own interest in satisfaction or part satisfaction of the money due from him to the estate. This conveyed a one-eighth interest to the minor, Louis Brinker.

Has a lawful redemption been made of the minor's interest? He became of age June 22, 1907, and under the statute he may redeem at any time within one year after reaching majority. Sec. 1166, Stats. (1898). On June 19, 1908, within one year after he became of age, he deposited with the county clerk of Oneida county sufficient cash to redeem a one-eighth interest in the lands. This was a valid redemption. True, he had deeded the land to plaintiff in 1903, but it was held in *Hoffman v. Peterson,* 123 Wis. 632, 102 N. W. 47, that a minor can redeem in favor of a grantee after he has conveyed title by deed. The redemption made by the deposit of the check in 1905 must also be deemed sufficient. The county clerk accepted the check and did not object to the issuance of a redemption receipt on the ground that a check instead of money was tendered. It is stipulated that the check was and still is good. A tender of money must be held to have been waived by its acceptance and retention under the circumstances.

The result is that the order appealed from must be modified by decreeing that plaintiff is the owner in fee simple of an undivided one-eighth interest in the lands described in the complaint and that the defendant is the owner of an undivided seven-eighths thereof, and, as so modified, affirmed.

By the Court.—Order modified as indicated in the opinion, and, as so modified, affirmed, with costs in favor of appellant.

A motion for a rehearing was denied June 4, 1912.

FREEMAN, Respondent, vs. DELLS PAPER & PULP COMPANY, Appellant.

March 15—June 4, 1912.

Principal and agent: Implied authority of agent: Scope of authority: Master and servant: Injury: Incompetency of fellow-servant: Proximate cause: Evidence: Competency: Witnesses: Cross-examination: Impeachment.

1. An agent has implied authority to do all those things which are reasonably necessary and proper to carry into effect the main powers conferred and which are not forbidden; and secret instructions cannot affect his apparent powers to the detriment of third persons who have dealt with him on the faith thereof.
2. Plaintiff was injured while working at certain logging operations which one M. had contracted to perform for defendant. The question being as to whether, pursuant to a clause in the contract with M., defendant had by its agent taken charge and control of such logging operations, so that plaintiff, when injured, was a servant of defendant and not of M., directions given by defendant's agent to the men in the logging camp, as to what they were to do and how the work should be conducted, were competent evidence, as being *acts* of the agent, not mere oral statements affecting the question of his agency.
3. Evidence showing, among other things, that an employee engaged in loading logs on a flat car was young and inexperienced and did not place the logs which were to ride above the stakes of the car and the cross-chains attached thereto, in proper shape so that they would lie securely and properly tie the load, this being work which required the exercise of some skill, judgment, and care, is *held* sufficient to sustain a finding by the jury that he was incompetent.
4. The fact that a log fell off and injured plaintiff some time after the loading was completed, when the car was being moved down the track, and in the absence of the loader, does not show that the incompetency of the loader was not the proximate cause of such injury.
5. A party asking a witness an immaterial question on cross-examination is bound by the answer given, and it is error to permit the witness to be impeached relative thereto.
6. This rule applies where a witness is asked on cross-examination if he had not stated on a former occasion that another witness (who had not been interrogated in regard to the matter) had

made overtures to him suggesting an attempt at subornation of perjury, and denies making any such statement.

7. In such case evidence offered ostensibly to impeach the witness so interrogated was in effect an impeachment of the other witness involved, and where the latter was an important witness for the party calling him, and especially where the court refused to permit him to give his version of the matter, its admission was prejudicial error.

APPEAL from a judgment of the circuit court for Rusk county: JOHN K. PARISH, Judge. *Reversed.*

Action for personal injury sustained by the plaintiff on the 11th day of March, 1908, while, it is claimed, he was an employee of the defendant. The complaint contains appropriate allegations of the failure on the part of the defendant to discharge various duties owing to the plaintiff, including the failure to furnish a reasonably safe place to work, reasonably safe implements or equipments with which to work; failure to furnish a competent superintendent, competent fellow-servants, and sufficient number of fellow-servants; and failure to warn plaintiff of dangers known to the defendant but not known to him. The only negligence, however, which the evidence of the plaintiff tended to sustain was that in support of the allegation in the complaint "that it was the duty of the said defendant, its officers and agents, to furnish competent fellow-servants to work with said plaintiff and to furnish a competent person to load the logs on said car, and not to exact or require this plaintiff to work with an incompetent, careless, and unskilful person in or about any of such logging operations;" that defendant failed to perform its duty in that respect, and that the plaintiff, while in the exercise of ordinary care, was injured as a result of such failure.

The answer admits that plaintiff sustained some injury on or about the 11th day of March, 1908, but denies each and every other allegation of the complaint, including the allegation that the plaintiff at the time of the injury was in the employ of the defendant.

It appears that on the 5th day of June, 1907, the defendant and one Charles Mechling entered into a logging contract whereby Mechling was to cut and skid certain hemlock logs belonging to the defendant. The contract provided, among other things, that the scale of the logs was to be kept by a person to be mutually agreed upon, and that a separate record was to be kept of each log skidded, and that the scale so kept was subject to the supervision of scalers at Eau Claire; that, whenever requested, Mechling was to furnish a statement of supplies on hand, wages due, and also debts contracted of every kind and character which might be enforced as a lien upon the said logs. It further provided that defendant was to make advancements from time to time; that $3 a thousand was to be paid when the logs were skidded and the balance when the logs were received and scaled in the yard, provided there were no claims against said Mechling on logs or pulp wood. It was further provided that "in case the party of the first part shall at any time fail to perform any of the conditions of this contract on its part, or in the event that any fraud or irregularity is discovered in the scale, then and in that case the party of the second part may in their discretion take possession of logs and of property of said party of the first part used in doing said work and may cut, haul, and deliver said logs as aforesaid and complete said contract at the expense of the first party, or terminate this contract upon giving five days' notice in writing to the first party." Mechling started his camp under this contract, hired the plaintiff, and continued to put in logs for the defendant until on or about the 1st day of March, 1908, when, it is claimed by plaintiff, the defendant took charge of the work pursuant to the provisions of the contract. The defendant denies that it took charge of the work and claims that its agent, Patrick, was in Mechling's camp only for the purpose of seeing that no lienable claims accrued on its logs.

At the time of the injury and for several days prior thereto

the plaintiff and one Peter Skalski were engaged in loading logs upon a flat car. The car had stakes about six feet high and the logs were loaded level with these stakes, a chain put across, and then several tiers of logs put on top to bind the load. After the car was loaded it was hauled to a sidetrack a short distance away, and, while so being hauled, one of the logs lying above the stakes fell off and injured plaintiff. Plaintiff claims that prior to the injury he notified defendant's agent, Patrick, that Skalski was an incompetent loader and that he would not work with him any longer on that account; that Patrick asked him to remain, stating that he would get a competent loader as soon as possible; that, relying upon the promise so made, the plaintiff continued in the employment until he was injured. Defendant denies that plaintiff notified Patrick of the incompetency of Skalski, and denies that any promise to furnish a competent loader was made by its agent, Patrick.

The jury found (1) that there was an agreement or understanding between the defendant, the *Dells Paper & Pulp Company,* and Charles Mechling that the defendant should retain and exercise the right to direct the manner and means of carrying out the contract entered into by them; (2) that the defendant was in fact exercising and directing the manner and means of carrying out said contract on or before March 11, 1908, the day upon which plaintiff was injured; (3) that the witness Patrick took possession and control in carrying on the work by and for the defendant, as its superintendent, at the time plaintiff was injured; (4) that Patrick as superintendent for defendant did employ the plaintiff to work for defendant before the plaintiff was injured; (5) that the defendant gave the said Patrick apparent authority to employ the plaintiff for the defendant before the plaintiff was injured; (6) that Peter Skalski was an incompetent person to discharge the duties of loader; (7) that plaintiff informed the said Patrick that the said Skalski was an incompetent per-

son to perform the duties of loader before his said injury; (8) that plaintiff made objections to said Patrick to Skalski's continuing loading cars by reason of its being dangerous to him while the said Skalski was acting as loader; (9) that said Patrick promised the plaintiff to replace said Skalski with another loader; (10) that the plaintiff continued to work with Skalski in loading cars, relying on the promise of said Patrick to procure a competent loader in the place of said Skalski; (11) that plaintiff was injured by reason of the incompetency of said Skalski as loader; (12) that the incompetency of said Skalski was the proximate cause of said plaintiff's injuries; (13) that plaintiff was not guilty of any want of ordinary care which contributed proximately to produce his injuries; and (14) that plaintiff sustained damages in the sum of $10,500.

On the coming in of the verdict defendant moved, first, for judgment in its favor notwithstanding the verdict, or, second, that each of the several answers of the jury to the questions submitted be reversed, except as to question number 14, and that the sum of $4,000 be there substituted for $10,500, or, third, for judgment in favor of defendant on the record, the minutes of the court and upon the special verdict as amended, or, fourth, for an order setting aside said verdict and for a new trial, for the reasons, among others, that the court erred in the admission of evidence offered by the plaintiff, that the court erred in the exclusion of evidence offered by the defendant, and because of other errors appearing on the record and minutes of the court. (The record reads, as to the first ground, "because the court erred in the admission of evidence offered by the defendant," but on the oral argument it was admitted that the word "defendant" was intended to mean plaintiff, and that it so appeared in the record owing to a clerical error.) Thereafter an order was made denying defendant's first, second, and third motions, and denying defendant's fourth motion on all grounds except that the dam-

ages were excessive, and the court set aside said verdict on such ground unless the plaintiff remitted $2,000 from the amount awarded by the jury. Plaintiff filed a consent to remit said sum of $2,000, whereupon an order was made directing judgment to be entered upon the verdict in favor of the plaintiff for the sum of $8,500 damages, and costs. From a judgment entered accordingly the defendant appealed.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.*

W. H. Frawley and *T. F. Frawley,* for the respondent.

The following opinion was filed April 3, 1912:

VINJE, J. Defendant claims the evidence does not sustain the finding that it had taken charge of the logging operations in Mechling's camp at the time plaintiff was injured, and hence that the relation of master and servant did not exist between the parties. Plaintiff's evidence on this subject was to the effect that Patrick was an experienced woodsman and cruiser who had been employed by the defendant for seven or eight years; that from the time he went up there about the 1st of March he remained almost continuously till the injury occurred on the 11th; that the amount of Mechling's scale was in dispute, the defendant claiming it was from ten to fifteen per cent. too high; that at the end of the season a deduction of 200,000 feet was made; that Mechling was running behind on his contract, and this was known to the defendant and discussed by its officers; that Lee & Company, who had furnished supplies to Mechling, refused to furnish more, and were applying money advanced by defendant to the payment of supplies instead of to the payment of labor claims; that Mechling was then indebted to Lee & Company in the sum of about $1,000; that defendant itself refused to pay any more time checks, and there were claims against the pulp wood delivered. Such, the evidence of plaintiff shows, was the condition of affairs known to the defendant when

Patrick went to the camp about March 1st, and this condition, the evidence shows, was discussed by Stilp, who was then in charge of defendant's business, and Patrick, and it was their opinion that it cost Mechling too much to log. It was not possible to ascertain from the officers of the defendant just what instructions were given Patrick, but he testified that whatever instructions were given him he carried out when he arrived at the camp. The evidence of plaintiff also shows that when Patrick came to the camp he assumed full control of the operations. He gave all the orders. He hired men, and discharged at least one man. He made out all the time checks except the one given to the plaintiff, which was made out by Mechling at Patrick's request. Supplies were bought by him and sent to the camp in the name of the defendant. Mechling gave no more orders to the men, but became a common laborer, though the evidence showed he had worked as a laborer while he had charge of the camp earlier in the winter. The defendant's evidence on this subject contradicted plaintiff's in many material respects. So it became a question for the jury to say which was the more credible, and to find therefrom what the fact was as to whether or not the defendant had taken charge of the work at the time plaintiff was injured. *Ames v. D. J. Murray Mfg. Co.* 114 Wis. 85, 89 N. W. 836. Defendant admitted that Patrick was its agent and had been in its employ for seven or eight years, but it denied that he had authority to take charge of the camp for it. The question presented, therefore, was the scope of Patrick's authority as agent of the defendant, not the question of his being an agent for any purpose or at all. It is admitted that he was defendant's agent. Being such, and being the only representative of the defendant at the camp, it follows that, if defendant did take charge of the work, Patrick had authority to prosecute it in the usual and customary manner. *Ames v. D. J. Murray Mfg. Co., supra; Parr v. Northern E. Mfg. Co.* 117 Wis. 278, 93 N. W. 1099; *Arnold v. Nat. Bank,* 126

Wis. 362, 105 N. W. 828; *Abrohams v. Revillon,* 129 Wis. 235, 107 N. W. 656. In the *Parr Case, supra,* the court said:

"It is well understood that every delegation of power carries with it the authority to do all those things which are reasonably necessary and proper to carry into effect the main powers conferred, and which are not forbidden, and that secret instructions cannot affect such apparent powers to the detriment of third persons who have dealt with the agent on the basis of his apparent authority."

It is urged that the statements of Patrick made in giving orders to the men were inadmissible in evidence on the ground that agency cannot be established by the declarations of the alleged agent. They were not received for the purpose of establishing Patrick's agency, for that was admitted. They were competent upon the question as to whether or not the defendant took charge of the work. Upon this question, evidence as to the situation of the parties to the Mechling contract, what the defendant did, and what Mechling did, was competent. And the giving of directions by Patrick to the men as to what they were to do, and how the work should be conducted, must be regarded as the *acts* of the defendant's agent and not as mere oral statements affecting the question of his agency. The giving of an oral order to the men was an act in the sense that it showed what the agent did. We therefore conclude the court did not err in permitting evidence of the directions given by Patrick to the men while in camp. Such evidence bore upon the disputed question as to whether or not Mechling or the defendant was carrying on the work at the time plaintiff was injured.

The evidence as to Skalski's incompetency as a loader is quite vague and unsatisfactory. It is to the general effect that he was not handy with the hook; that he could not catch hold of a log as he ought to; that he was awkward and got off the cars when the logs came up. But there is also some evidence that he did not place the logs in proper shape so that they would lie firmly on the load. He was a young man,

quite inexperienced in loading logs, and it is evident that the loading of logs, at least above the stakes of the car, requires the exercise of some skill, judgment, and care in order that the logs may lie as securely and firmly as practicable and properly tie in the load. The jury evidently thought he lacked this skill or judgment, or both, and found him incompetent. We cannot say that such finding is not supported by the evidence.

A further point is made by the defendant that the incompetency of the loader was not the proximate cause of plaintiff's injury, since the loading had been finished sometime before plaintiff started to move the car down the track at which time the log fell off and injured him. The jury found that the incompetency of Skalski was the proximate cause of the injury to plaintiff, and in so doing they must have found that the log fell off by reason of its not having been properly loaded. It is not necessary that the proximate cause be immediate in time. *Deisenrieter v. Kraus-Merkel M. Co.* 97 Wis. 279, 72 N. W. 735. The fact that the accident took place sometime after the loading was completed and when the loader was not present is immaterial.

John LaSpronce was sworn as a witness for defendant and testified in chief as to how the work was conducted in Mechling's camp and more particularly as to how Skalski loaded the cars and how it was customary to load cars in logging camps. Upon cross-examination he was asked, against defendant's objection, if at a certain time and place he stated to one Charles Hunter that the witness Patrick had requested LaSpronce to sign a paper stating that the defendant had not taken the contract out of Mechling's hands and that Patrick had offered to give LaSpronce the Mechling contract if LaSpronce would sign such paper, and that LaSpronce refused to do so. In reply to this inquiry the witness stated that he had not made such statement to Hunter, that he had not signed any paper for Patrick, that Patrick had not asked him

to sign any paper, that Patrick did not offer him the Mechling contract, or any contract, as a condition of his signing any paper, but that Patrick had spoken to him at one time about taking a contract to put in some other timber, and that that conversation had no reference whatever to this case and had nothing to do with it. Afterwards plaintiff called Charles Hunter as a witness and he was permitted, against defendant's objection, to testify that LaSpronce had made the alleged statement to him. Later the defendant recalled Patrick and offered to prove just what statements he had made to LaSpronce and what the facts were with reference to the conversation between him and LaSpronce, but he was not permitted to testify. The court clearly erred in permitting Hunter to testify as to the alleged statement made to him by the witness LaSpronce. Even if the facts were as claimed by the witness Hunter, they would not tend to discredit the witness LaSpronce in the least, because there was no claim that LaSpronce signed such paper or took a contract under any agreement that he would claim that the defendant was not in charge of the work at the time plaintiff was injured. The only effect such testimony could have would be to discredit the witness Patrick. He had not been interrogated on the subject at all. The alleged statement of LaSpronce was not in conflict with any testimony that he had given in court, therefore it did not tend to contradict or impeach his evidence. So far as his testimony was concerned, it was entirely immaterial whether or not he made the statement or whether or not Patrick had made the statement to him, for the evidence is uncontradicted that he refused to comply with the suggestions or offers of Patrick, if any were made to him. A party asking a witness an immaterial question on cross-examination is bound by the answer given and it is error to permit the witness to be impeached relative thereto. *Crawford v. Christian,* 102 Wis. 51, 78 N. W. 406; Jones, Ev. (2d ed.) § 827 (827, 828). The effect of Hunter's evidence, how-

ever, if believed, was to directly impeach and discredit the witness Patrick in a very material respect. If the jury believed Hunter's testimony, they might come to the conclusion that Patrick was guilty of an attempt to suborn a witness for the defendant, and that he was therefore unworthy of belief as to any matter in dispute between the parties. The prejudicial effect of such evidence becomes more apparent when it appears, as the fact was, that the only testimony in the case to show that plaintiff complained to Patrick that the loader Skalski was incompetent was the testimony of the plaintiff himself, and this testimony the witness Patrick flatly contradicted. The jury may well have come to the conclusion that plaintiff, and not Patrick, was to be believed in this matter in dispute, because of the fact that Hunter's testimony left Patrick impeached and discredited. Plaintiff was permitted to show an attempt on the part of Patrick to suborn a witness, but the defendant was not permitted to disprove such alleged attempt. The ruling was in effect the same as permitting only one party to introduce evidence as to a material fact in dispute. It was clearly prejudicial, and must result in a new trial. The defendant's case rested largely on the testimony of the witness Patrick, and entirely so upon the question as to whether or not plaintiff had complained of Skalski's incompetency as a loader and as to whether Patrick had promised to hire another man in Skalski's place as soon as possible. Any improper impeachment of so important a witness must be deemed prejudicial error.

Since there must be a new trial for the reasons stated, several alleged errors relating to instructions given and refused, as well as to the refusal to submit certain questions proposed by the defendant and the giving of other questions contained in the special verdict, will not be noticed. They are of minor importance and not likely to recur upon another trial.

For the errors committed by the trial court in permitting the witness Hunter to testify apparently to impeach the wit-

ness LaSpronce, but in fact to impeach the witness Patrick, and in refusing to permit the witness Patrick to testify in reply thereto, the judgment must be reversed and the cause remanded for a new trial.

By the Court.—Judgment reversed, and cause remanded for a new trial.

A motion for a rehearing was denied June 4, 1912.

HANSON, Appellant, vs. CHIPPEWA VALLEY & NORTHERN RAILWAY COMPANY and another, Respondents.

March 16—June 4, 1912.

Trial: Special verdict: Changing finding: Railroads: Injury to person walking on track: Contributory negligence: Failure to look and listen.

1. Where the trial court has submitted in a special verdict a question which, upon the undisputed evidence, can properly be answered in but one way, it should change a contrary finding by the jury.
2. Where an employee in a mill yard, familiar with the whole situation and with the operation of engines on a railroad which served the mill, without any particular reason for so doing walked upon the railroad track in going from his work to his boarding house, although other and perfectly safe routes were just as convenient, and neither when entering upon the track nor while walking thereon looked or listened for an approaching engine, he was, as a matter of law, guilty of contributory negligence precluding a recovery for an injury caused by his being struck by an engine.

APPEAL from a judgment of the circuit court for Rusk county: JAMES WICKHAM, Circuit Judge. *Affirmed.*

Action for personal injury.

February 26, 1909, plaintiff was an employee of defendant

lumber company, in and about its sawmill and lumber yard at or near Atlanta, Wisconsin. Defendant, railroad company, was a duly organized railway corporation, its stockholders being the proprietors of the lumber company and its business with little exception, being supplementary to the sawmill manufacturing and logging business of such company. There was some eighteen miles of road, including the switch tracks. There were two engines in use, which frequently were operated on the main line and the switch track. One of the engines was liable to pass over the main line or a switch track most any time during working hours. Customarily each was operated by a full crew, but, sometimes, by only the fireman. The latter was the case, as to both engines, on the occasion in question. The business was carried on at that time as it customarily had been for two or three years or more. The main track ran north from Bruce and, at the mill property, along the east side of a small stream and mill pond west of the mill. A short distance below the dam there was a bridge extending west across a small stream. Further west a few rods there was another small stream. Both were supplied with water from above the dam and united a short distance below, forming an island. There was a wagon road from the northeast crossing the planing-mill track about twenty-four rods from the bridge and describing a curve till the direction became southwest thereto, then the direction was west across the bridge, the island, and a second bridge and on to the mill boarding house. Near the east end of the bridge the planing-mill track and main line united. From there the former ran northeast, crossing the wagon road as before indicated, then on several rods to the southerly side of the planing mill. About thirty-five feet north of the junction, aforesaid, a switch track diverged from the main line some eight or ten feet and then ran parallel with it for some little distance, such switch track being used for unloading logs and turning them into the mill pond. At a point north of the lat-

ter switch, forty or fifty feet, more or less, the main-line track and the log track were the distance apart before indicated. At such point the main-line track and the planing-mill track were some thirty feet apart. The mill was north of such point six or eight rods, the southwest corner being near the the main track and southeast corner a short distance from the planing-mill track. On the east side of the main track, some ten rods north of the junction aforesaid and six rods or so north of the log-track switch, there was a pump house and water tank. Plaintiff worked in the yard north-northeast of the planing mill. There was a road by which employees could go therefrom to the boarding house. Sometimes they went by way of the road and sometimes partly thereon, then down the planing-mill track or alongside of it to the bridge, or partly on or along such track and partly down the main track, according to their pleasure. No objection was made, prior to the accident, by either defendant to the men taking the course on or along the tracks in going from their working places to the boarding house. The custom had been as indicated for two years or more. Plaintiff and the officers of both defendants were familiar therewith. The former had worked for the lumber company so long that he was familiar with all the operations in or about or in connection with his duties, including the particular movements of the engines which occurred just prior to the injury. He was a person of full age, of average intelligence, and in full possession of his faculties. The main track from the planing mill to the pump house was on a slight down grade, while from the switch northeast on the planing-mill track there was a slight up grade. About 12 o'clock noon, as the signal for the midday meal was given, plaintiff and his associates started for the boarding house. He traveled on the road a short distance and then cut across a distance of several rods to the south and entered upon the planing-mill track. About that time one of the engines which had been run to the pump house for water

went back therefrom to the planing-mill switch and in on the planing-mill track. Plaintiff and others, as they traveled southwest, saw it coming toward them and stepped off the track on the westerly side at a point 100 feet, more or less, from the switch, and then went toward the main track which was some thirty-five feet further west. They might have gone east about three times that distance and reached the road, or traveled between the tracks of the main line and those of the planing-mill line a short distance till the engine passed by, or waited for it to do so, or gone around it if it was standing still, or taken any other of several courses, avoiding the way down the main track. Instead of doing so they crossed to such track, entered thereon, and then turned towards the bridge purposing to travel between the rails. At this time steam and smoke were escaping from the engine on the planing-mill track, and perhaps from the second engine as well, which was approaching from the south. The latter had been run down the planing-mill track to a clearance at the junction so that as soon as the first engine was in on the planing-mill track it could be backed north on the main track to the water tank. As plaintiff started south on such track the engine came backing up, drifting quite slowly, and not working steam. That was the condition as plaintiff testified, and, further, that the way before him was so obscured by smoke and steam that he could not have observed such an object as the engine backing toward him though not more than a few feet away; that there was no signal of its approach; that the back end of the tender suddenly came into view but a step or so away; and that he instantly attempted to escape from the danger but failed to do so. The engine struck and severely injured him. A companion who was a few feet behind him was also struck, either by the engine or by him as he was knocked or caused to suddenly jump back.

The following is, substantially, plaintiff's evidence in detail: I started southwest on the road leading from the yard

where I was at work to go to the boarding house. After traveling a few rods I turned to the left and proceeded down the planing-mill track. There was no particular reason for doing so though I had customarily gone that way. I could just as well have kept the road. After proceeding some distance I saw an engine coming toward me. I turned to the left to avoid it and crossed to and entered upon the main track. I knew there were two engines around there. I knew it was necessary to be careful. When I entered upon the main track I did not look for an engine. The steam and smoke down the track was very thick but I could see the track. When I stepped on it I was looking straight ahead. I saw the engine just before it reached me. When I was approaching the main track and stepping upon it I did not look for an engine or listen for one. I was thinking of my dinner. I thought if there was an engine it might be standing still. There was nothing to obstruct my view but the steam and smoke. I did not hear the engine on the main track puffing out steam. There was other evidence tending to show that persons not as well circumstanced as plaintiff for seeing the engine observed it some little time before the accident.

There was an issue formed by the pleadings as to whether the railroad company violated the fence law and whether the failure to fence contributed to produce the injury, and there was evidence in respect thereto.

The jury found all issues for the plaintiff except those in respect to failure to fence, but the court, on motion, changed the answers of the special verdict on the subject of contributory negligence of plaintiff to findings in favor of the defendant. A motion for judgment on the verdict, as rendered, was denied, and a motion for judgment in defendant's favor on the corrected verdict was granted.

For the appellant there was a brief by *Ekern & Eggum*, and oral argument by *H. L. Ekern*.

For the respondents there was a brief by *Goggins & Brazeau*, and oral argument by *T. W. Brazeau*.

The following opinion was filed April 3, 1912:

MARSHALL, J. The foregoing statement leaves but little, if anything, which need be said in deciding this case.

Appellant having testified that he neither looked nor listened for an approaching engine or car when entering and walking upon the railway track, and been corroborated by all physical and other circumstances affecting the case, how could the trial court have well done otherwise than change the answer of the jury which was directly contrary thereto? It is rather unexplainable that the question was submitted to the jury at all. Such submission furnishes about the only explanation there is why the jury answered as they did. They regarded the attitude of the court, and rightfully so, as considerately indicating that the evidence might probably warrant a finding either way. It was the duty of the court, otherwise, to withdraw the matter from the jury. The result seems to have moved the judicial mind to a more careful consideration of the matter and the conclusion being reached that there was no substantial basis in the evidence for the answer of the jury to rest upon, with which we agree.

In view of the admitted fact that appellant proceeded in the face of danger up to the instant of the accident without thought for his personal safety, and under circumstances, which have been held over and over again, should have efficiently aroused such thought, we cannot well say the trial court was wrong in holding, as matter of law, that he was guilty of contributory negligence.

True, there are some circumstances shown by the evidence which might fairly be regarded as differentiating the case from the ordinary one of a licensee being injured while walking upon a railroad track without using his faculties for seeing and hearing to avoid colliding with moving cars; but they are outweighed by other circumstances, particularly the presence of smoke and steam preventing efficient performance of the duty to look out for danger and the entire absence of ex-

cuse for taking the particular way of reaching the boarding house when there were other ways, just as convenient and perfectly safe. On the whole, no good reason is perceived why the decision of the trial court should be disturbed. If the matter were even involved in fair doubt, that deference which is due to the trial jurisdiction would require the doubt to be resolved in favor of affirming the judgment.

By the Court.—Judgment is affirmed.

TIMLIN, J., took no part.

A motion for a rehearing was denied June 4, 1912.

SMITH, Respondent, vs. DIXON and another, imp., Appellants.

April 3—June 4, 1912.

Corporations: Judgment: Enforcement against stockholders after dissolution: Judgment note: Authority of manager to execute: Receipt of money by corporation: Evidence.

1. A judgment against a corporation, duly entered upon a judgment note executed by the secretary and manager thereof, is *prima facie* valid, and in an equitable action to collect the same from stockholders who received the entire property of the corporation upon its dissolution it is incumbent upon the defendants to show affirmatively, not only that the secretary had no authority to execute the note, but also that it would be unjust and inequitable to enforce the judgment.
2. To show that the judgment is inequitable in such a case it should be made to appear affirmatively that the corporation did not receive to its own use the money represented by the note. The evidence in this case is *held* not to show that fact.
3. Evidence that during the two months after the note was given no single deposit of the amount of the note was made by the corporation at the bank at which it did business, and no larger deposit in which that amount might have been contained, is of little weight to show that the corporation did not receive

the money, especially where the business of the corporation was transacted at a village ten miles from the bank and trips to the banl were made only once in several days.

4. Delay by the holder of such note, at the request of the secretary of the corporation, for more than three years after it became due, before entering judgment thereon, during which time the secretary became insolvent, is *held* under the circumstances of this case not to have constituted laches precluding enforcement of the judgment.

5. Without special authority, express or implied, the secretary and business manager of a corporation has no power to make a judgment note on its behalf.

APPEAL from a judgment of the circuit court for Kenosha county: F. C. ESCHWEILER, Judge. *Affirmed.*

This is a creditor's action, brought by the plaintiff to wind up the affairs of the New Exchange Company, a business corporation, joining as defendants the appellants, *Dixon* and *Schenning,* and F. W. Hahn. It appeared on the trial that the plaintiff entered judgment against the corporation November 11, 1910, upon a judgment note alleged to have been executed by the company to one Brock, February 1, 1906, due one year after date, and subsequently assigned to the plaintiff. Prior to the commencement of the present action execution was issued on this judgment and returned wholly unsatisfied. It appeared further that *Dixon, Schenning,* and Hahn conducted a mercantile business as copartners in the village of Schennington, Monroe county, for several years prior to April, 1905, at which time they organized a corporation called the New Exchange Company to carry on the business and turned over the partnership property to the corporation in payment for its authorized capital stock of $25,000, of which stock Hahn received about one half and *Schenning* and *Dixon* about one fourth each. The actual value of the property so turned over did not exceed $20,000. The business thereafter was conducted by Hahn, who resided at Schennington, while *Dixon* and *Schenning* resided in Kenosha county and only occasionally visited Schennington. Decem-

ber 7, 1906, all the assets of the corporation were sold to the firm of Baker & Son, *Dixon* and *Schenning* each receiving promissory notes of Baker & Son aggregating about $3,700, and Hahn receiving in notes and cash not less than $6,000 and the outstanding open accounts of the corporation, which he was to collect and use the proceeds in paying certain debts of the corporation. For some years Hahn had loaned money for other parties on notes and mortgages, and prior to February, 1906, had negotiated a loan of that kind for one Christian Brock, who lived at Rochester, Racine county. This loan was paid to Hahn about February 1, 1906, and he wrote to Brock telling him that he could use the money in the store for his business, and sent to him the judgment note in question, signed in the name of the corporation as maker, and guaranteed by himself individually. He also stated to Brock that as soon as he found a place to invest the money on mortgage he would do so. Brock accepted the note, and *Smith* purchased it in April, 1909, entered judgment upon it in November, 1910, and commenced this action in December following. The corporation never had given authority to Hahn to execute judgment notes for the corporation, nor does it appear that he ever executed such a note at any other time. Hahn was secretary of the business, and at times made loans for use in the business at Warren's Bank at Tomah (where the banking of the corporation was done), which loans were paid at maturity. *Dixon* and *Schenning* testify that they did not know of these loans and that they did not authorize them. The corporation itself was dissolved by resolution duly filed December 30, 1907, and this action was commenced within three years thereafter. Hahn was solvent at the maturity of the judgment note, but insolvent when the action was commenced. He did not appear in the action, and his testimony was not obtained by either party, although effort was made to serve a subpœna upon him. The corporation had no other creditors. The trial court concluded as matters of fact that Hahn had implied authority to bor-

row money for the corporation, and that the corporation received and applied to its own use the amount represented by the judgment note, and rendered judgment against *Dixon, Schenning,* and Hahn jointly and severally for the amount of the judgment on cognovit. From this judgment *Dixon* and *Schenning* appeal.

For the appellants there was a brief by *Quarles, Spence & Quarles,* attorneys, and *J. V. Quarles, Jr.,* of counsel, and oral argument by *I. A. Fish.*

E. John Wehmhoff, for the respondent.

The following opinion was filed April 23, 1912:

WINSLOW, C. J. The plaintiff, in his character as a judgment creditor of a corporation unable to collect his judgment by execution, asks the assistance of a court of equity to collect his judgment from the defendants who received the entire property of the corporation upon its dissolution. *Prima facie* his judgment is a valid judgment based upon a valid judgment note. In order to successfully resist the collection of the judgment the defendants must not only show affirmatively that Hahn had no authority to execute the judgment note, but that it would be unjust and inequitable to enforce the judgment. *Ford v. Hill,* 92 Wis. 188, 66 N. W. 115.

The court found in substance that the judgment was not inequitable, because it appeared that the corporation had received to its own use the $600 represented by the note. This conclusion was evidently reached because the proof failed to show affirmatively that the corporation did not receive and use the money, and hence that the *prima facie* effect of the judgment in this regard had not been overcome. With this conclusion we agree. The appellants had no personal knowledge on the subject themselves, and really the only proof submitted by them tending to show that the corporation did not receive the money was the evidence of the cashier of the bank at which the corporation transacted its business, showing that there was no single deposit of $600 made during the months

of February and March, 1906, nor of any sum in which the sum of $600 might have been contained, but that all the deposits were of smaller sums ranging from $53.81 to $414.22, except the deposit of February 9th, amounting to $1,086.37 (which was shown to contain a certain draft of $1,000), and the deposit of $995.50 of March 24, 1906, nearly two months after the receipt of the $600. This proof does not seem very persuasive. It is very well known that in an active mercantile business bills for merchandise and expenses are continually falling due, and that it is not infrequent that money coming in is paid out even in considerable sums without going through the bank at all. Especially would this be apt to occur when, as here, the business was transacted at a small village ten miles or more from the bank, and trips to the bank were not made daily, but only once in several days.

The defendants *Dixon* and *Schenning* knew nothing about the books of the concern, apparently made no effort to ascertain where they were or what they contained, or to obtain them, or to secure the attendance of Hahn as a witness on the trial. The trial judge considered these facts of considerable significance upon the question whether the defendants had lifted the burden of proof resting in them to show that the judgment was inequitable, and we think he was quite right in so doing.

It is argued that there was laches in keeping the note without entering judgment thereon for more than three years after it fell due, during which time Mr. Hahn became insolvent. We do not regard the suggestion as of weight. Hahn was transacting business at a place many miles removed from the plaintiff and his assignor. He was evidently trusted by all parties, and especially by the plaintiff, until the spring of 1910. The delay was granted at the request of Hahn, apparently in good-faith reliance upon his supposed trustworthy character, and we do not consider it a case where justice calls for the application of the doctrine of laches.

The conclusions reached render it unnecessary to consider the question of the power of Hahn to execute a judgment note on behalf of the corporation. No reason is perceived, however, for departing from the principles laid down in *Ford v. Hill,* 92 Wis. 188, 66 N. W. 115, and *Calteaux v. Mueller,* 102 Wis. 525, 78 N. W. 1082, and under this rule it cannot be held that Hahn had such authority.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied June 4, 1912.

LAWLER, Respondent, vs. BRENNAN and others, Appellants.

October 27, 1911—January 9, 1912.
April 27—June 4, 1912.

Towns: Action by town board must be at meeting: Highways: Tunnels: Right to construct: Channel connecting with lake: Location of highway on lake: Evidence: Rights of abutting owners.

1. Where an act, such as the granting of a permit, must be done by a board, the action must be taken at a meeting at which all members of the board are present or of which all have had proper notice.
2. Thus, a written permit, purporting to grant to a landowner the right to construct a ditch or channel across a highway for the purpose of connecting his lands east of the highway with a lake lying to the west thereof, is of no validity where no such action was taken at a meeting of the town board, although such permit was signed individually at different times and places, by all members of the board.
3. Upon the evidence in this case, stated in the opinion, including records, subsequent surveys, and testimony as to practical location, it is *held* that the highway upon which plaintiff's lands abut on the east extends to a lake on the west, and that he owns no land on the west side thereof and hence has neither a common-law nor a statutory right to construct a tunnel or channel under or across the highway.

BARNES and MARSHALL, JJ., dissent.

APPEAL from a judgment of the circuit court for Walworth county: A. J. VINJE, Judge. *Reversed.*

The plaintiff is the owner of a strip of land fronting on Lake Geneva. A highway passes across said land adjacent to said lake. Plaintiff is a dealer in ice, and, being desirous of building an ice house on his land, and of digging a channel from such ice house to said lake so as to convey the ice therein, applied to the town board of the town of Linn, in which said land was situated, for permission to dig such ditch across the highway and construct a bridge over the same, and at the same time presented to said board for its approval certain plans for the proposed ditch. The town board denied the right of plaintiff to construct any ditch across said highway and threatened to prevent him from so doing. Whereupon plaintiff commenced this action to enjoin the board from interfering with him in constructing such ditch. The defendant answered, denying the right of the plaintiff to intersect said highway with a ditch, and set up certain facts by way of counterclaim and secured an injunction enjoining the plaintiff *pendente lite* from interfering with the highway. Upon the conclusion of the trial of the action the court held that plaintiff, as the owner of the fee in the highway subject to the easement, had the right, under reasonable restrictions and regulations, to construct the proposed ditch across said highway, and prescribed the conditions under which the ditch should be constructed. From the judgment entered in plaintiff's favor defendants appeal.

For the appellants there was a brief by *Simmons & Walker, Charles S. French,* and *Thomas M. Kearney,* and oral argument by *Mr. Kearney* and *Mr. John B. Simmons.* They contended, *inter alia,* that the public is entitled to the full and free use of all the territory embraced within a highway to its full length and breadth, not only for traveling but for all the purposes that are legitimately incident thereto, such as the laying of drains therein, taking the soil therefrom for

purposes of repair, and the doing of any act therein conducive to the public health, comfort, or necessity that does not diminish or impair the travel thereon. Elliott, Roads & Streets (2d ed.) § 645; Angell, Highways, § 226; *Johnson v. Whitefield,* 18 Me. 286; *Hart v. Mayor,* 9 Wend. 571; *Goodrich v. B., C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653; *Gregory v. Comm.* 2 Dana, 417; *Stetson v. Faxon,* 19 Pick. 147; *Barker v. Comm.* 19 Pa. St. 412; *Gunter v. Geary,* 1 Cal. 462; *Radcliffe's Ex'rs v. Mayor,* 4 N. Y. 195; *Snyder v. Rockport,* 6 Ind. 237; *Gassler v. Georgetown,* 6 Wheat. 593; *Harrower v. Ritson,* 37 Barb. 301. Therefore "any permanent structure or pourpresture which materially encroaches upon a public street and impedes travel is a nuisance *per se* and may be abated notwithstanding space is left for the passage of the public." *State v. Berdetta,* 73 Ind. 185; *Pettis v. Johnson,* 56 Ind. 139; *Comm. v. Blaisdell,* 107 Mass. 234; *People v. Vanderbilt,* 28 N. Y. 396; *State v. Woodward,* 23 Vt. 92; *Hibbard, S., B. & Co. v. Chicago,* 173 Ill. 91, 50 N. E. 256; 1 Wood, Nuisances (3d ed.) §§ 251, 260, 262; *Driggs v. Phillips,* 103 N. Y. 77, 8 N. E. 514; *Att'y Gen. ex rel. Holtz v. Heishon,* 18 N. J. Eq. 410; *Smith v. State,* 23 N. J. Law, 130; *State v. Atkinson,* 24 Vt. 448; Angell, Highways, § 223; *Goodrich v. B., C. R. & N. R. Co.* 103 Iowa, 412, 72 N. W. 653; *Cohen v. Mayor, etc.* 113 N. Y. 532, 21 N. E. 700, 4 L. R. A. 406. See, also, *Bybee v. State,* 94 Ind. 443, 48 Am. Rep. 175; *Tilly v. Mitchell & L. Co.* 121 Wis. 1, 98 N. W. 969; *Field v. Barling,* 149 Ill. 556, 37 N. E. 850; *Reimer's Appeal,* 100 Pa. St. 182; *Snively v. Washington Tp.* 218 Pa. St. 249, 67 Atl. 465, 12 L. R. A. N. S. 918; *Pemberton v. Dooley,* 43 Mo. App. 176. Not only would the channel which plaintiff proposed to construct across and within the limits of the public highway in question be a nuisance at common law and preventable under the statute, but it was the duty of the town of Linn to prevent the construction or

maintenance of such a nuisance and to keep its highways in a reasonably safe condition for travel by night as well as by day. *Draper v. Ironton,* 42 Wis. 696; *Stilling v. Thorp,* 54 Wis. 528, 11 N. W. 906; *Vass v. Waukesha,* 90 Wis. 337, 63 N. W. 280; *Johnson v. Highland,* 124 Wis. 597, 102 N. W. 1085. And as the official representatives of the town and as its officers, the defendant supervisors were charged with the duty of causing such encroachment and obstruction of the way to be summarily removed. *Neff v. Paddock,* 26 Wis. 546; *Hubbell v. Goodrich,* 37 Wis. 84. Sec. 1346, Stats. (1898), was designed for the purpose of facilitating the use of land on one side of a highway with land on the other, and cannot be strained so that it will apply to the flotation of ice from a navigable or public water not belonging to the proprietor nor within his boundaries on either side to an ice house constructed some distance inland. *Morse v. Buffalo F. & M. Ins. Co.* 30 Wis. 534; *Wis. Cent. R. Co. v. Smith,* 52 Wis. 140, 8 N. W. 613; *Jensen v. State,* 60 Wis. 577, 19 N. W. 374; *State v. Goodrich,* 84 Wis. 359, 54 N. W. 577; *State ex rel. Lederer v. Inter-National Inv. Co.* 88 Wis. 512, 60 N. W. 796. They also discussed at some length riparian rights; what they are and to whom they belong,—citing many cases.

For the respondent there was a brief by *Fred Kull, Burr W. Jones,* and *J. L. O'Connor,* and oral argument by *Mr. O'Connor* and *Mr. Jones.* They argued, among other things, that plaintiff was simply exercising a property right; that in the exercise thereof he was not unreasonably interfering with the public easement with which his property is burdened; that the defendants threatened to interfere with him in excess of their lawful authority and under color of office; and that this action may be maintained without waiting for an overt act of interference on the part of the defendants. Spelling, Injunctions, § 612; *Flood v. Van Wormer,* 147 N. Y. 284, 41 N. E. 569; *Elsheimer v. Niagara Falls,* 17 App.

Div. 618, 44 N. Y. Supp. 1116; 16 Am. & Eng. Ency. of Law (2d ed.) 361; High, Injunctions, p. 5, § 4; *Vicksburg W. W. v. Vicksburg,* 185 U. S. 65, 22 Sup. Ct. 585; *Pueblo & A. V. R. Co. v. Board of Comm'rs,* 5 Colo. App. 129, 38 Pac. 112, 114; *Flanders v. Wood,* 24 Wis. 572; *Miller v. Hoeschler,* 121 Wis. 558, 99 N. W. 228; *Church v. Joint School Dist.* 55 Wis. 399, 13 N. W. 272; *Uren v. Walsh,* 57 Wis. 98, 14 N. W. 902; *Joseph Schlitz B. Co. v. Superior,* 117 Wis. 297, 93 N. W. 1120. Even if plaintiff were divested of his riparian rights, still he may make such use of the soil of the highway for pleasure or for profit as he may deem necessary, not inconsistent with the public easement. As to the estate of an abutting owner in a rural highway, see 1 Am. & Eng. Ency. of Law (2d ed.) 242; *Gardiner v. Tisdale,* 2 Wis. 153; *Andrews v. Youmans,* 78 Wis. 56, 47 N. W. 304; *Huston v. Fort Atkinson,* 56 Wis. 350, 14 N. W. 444; *Brickwell v. Hamele,* 57 Wis. 490, 15 N. W. 190; *Mariner v. Schulte,* 13 Wis. 692; *Pettibone v. Hamilton,* 40 Wis. 402; *Goodall v. Milwaukee,* 5 Wis. 32; *Milwaukee v. M. & B. R. Co.* 7 Wis. 85; *Krueger v. Wis. Tel. Co.* 106 Wis. 96, 102, 81 N. W. 1041; *Tucker v. Eldred,* 6 R. I. 404; *Goodtitle v. Alker,* 1 Burr. 133; *Barclay v. Howell's Lessee,* 6 Pet. 498, 513; *Cole v. Drew,* 44 Vt. 49, 8 Am. Rep. 363; *Kincaid v. Indianapolis N. G. Co.* 124 Ind. 577, 24 N. E. 1066, 19 Am. St. Rep. 113; *Consumers' G. T. Co. v. Huntsinger,* 14 Ind. App. 156, 39 N. E. 423; *Pemberton v. Dooley,* 43 Mo. App. 176; Washburn, Easem. & Serv. (3d ed.) 228; *Harrison v. Brown,* 5 Wis. 27, 31; *Old Town v. Dooley,* 81 Ill. 255; *Tacoma S. D. Co. v. Chicago,* 247 Ill. 192, 93 N. E. 153; *Glencoe v. Reed,* 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901; *Rich v. Minneapolis,* 37 Minn. 423, 35 N. W. 2, 5 Am. St. Rep. 861; *Viliski v. Minneapolis,* 40 Minn. 304, 41 N. W. 1050; *Robert v. Sadler,* 104 N. Y. 229, 10 N. E. 428, 58 Am. Rep. 498; *Inhabitants of Woburn v. Henshaw,* 101 Mass. 193, 198; *Adams v. Emerson,* 6 Pick.

57; *Story v. N. Y. E. R. Co.* 90 N. Y. 122, 161; *Coverdale v. Charlton,* L. R. 4 Q. B. Div. 104; *McCarthy v. Syracuse,* 46 N. Y. 194. Every abutting owner upon a highway has a lawful right to obstruct the public travel in a limited degree, and the absolute right to divert the public travel, for a reasonable time, while improving his own estate. *Hundhausen v. Bond,* 36 Wis. 29. See, also, *Chamberlain v. Enfield,* 43 N. H. 356; *Holden v. Shattuck,* 34 Vt. 336; *Palmer v. Silverthorn,* 32 Pa. St. 65; *Overman v. May,* 35 Iowa, 89; *Shawnee Co. v. Beckwith,* 10 Kan. 603; *Papworth v. Milwaukee,* 64 Wis. 389, 25 N. W. 431; *Suffield v. Hathaway,* 44 Conn. 521, 26 Am. Rep. 483; *Jackson v. Hathaway,* 15 Johns. 447; 15 Am. & Eng. Ency. of Law (2d ed.) 419; *Perley v. Chandler,* 6 Mass. 454; *Highway Comm'r v. Martin,* 88 Mich. 115; *Pemberton v. Dooley,* 43 Mo. App. 176; *Gordon v. Peltzer,* 56 Mo. App. 599; *Groton v. Haines,* 36 N. H. 388; *Clay v. Hart,* 25 Misc. 110; *Dexter v. Riverside & O. Mills,* 15 N. Y. Supp. 374, 39 N. Y. St. Rep. 933; *McCarthy v. Syracuse,* 46 N. Y. 194; *Woodring v. Forks Tp.* 28 Pa. St. 355, 70 Am. Dec. 134; *Dygert v. Schenck,* 23 Wend. 445; *Phœnixville v. Phœnix I. Co.* 45 Pa. St. 135. The statutes of this state, either directly affecting the abutting landowners or defining the powers and duties of the town board, do not diminish the landowners' common-law rights. They also discussed the plaintiff's rights under sec. 1346, Stats. (1898), and the nature of riparian rights.

The following opinions were filed January 9, 1912:

BARNES, J. His Honor, Mr. Justice VINJE, tried this case while on the circuit bench, and is therefore disqualified from taking part in the decision on the appeal in this court. Justices SIEBECKER, KERWIN, and TIMLIN are of the opinion that the judgment of the circuit court should be reversed. Chief Justice WINSLOW, Justice MARSHALL, and the writer are of the opinion that the judgment appealed from should

be affirmed. There being an equal division of the members of the court qualified to participate in the decision, as above indicated, the judgment of the circuit court must be affirmed.

By the Court.—It is so ordered.

TIMLIN, J. This case is affirmed upon equal division between the six qualified members of this court. Nevertheless I think it advisable to make a memorandum of the reasons which led me to vote for reversal.

In this case the plaintiff owned a piece of land about 400 feet in width abutting on the east side of a public highway. On the west side of this highway lies Lake Geneva, a meandered navigable body of water.

It was contended by the plaintiff and the court found that a narrow strip of the plaintiff's land extended west of the highway and between the western boundary of the highway and the waters of Lake Geneva. The highway was sixty-six feet wide and skirted the lake for some distance. The plaintiff desired to connect his land with the waters of the lake by a ditch across the highway and applied to the town board of supervisors for permission so to do, and that board refused permission by declining to take any action granting such permission. The circuit court found that prior to the commencement of the action the defendants, who are the supervisors of the town of Linn, threatened to prevent the plaintiff from constructing and maintaining a tunnel or subway upon his land under said highway, and that a tunnel or subway constructed according to plans and specifications annexed to the findings and according to the findings would not unreasonably interfere with the public easement. Conclusions of law and a judgment followed, the judgment perpetually restraining the defendants from in any wise interfering with the plaintiff in the construction or maintenance of said tunnel or subway or the use thereof, "provided, however, that the foregoing is conditioned as follows: (A) That the plaintiff

shall at his own expense construct and maintain such tunnel or subway according to the plans and specifications hereto annexed, made a part of this judgment and marked 'Exhibit A,' and provided that in the construction and maintenance of said tunnel the plaintiff shall not in any manner interfere with or obstruct the travel upon said highway, or in any way injure or damage the same except in so far as it may be necessary and proper in the proper maintenance and construction of said specified tunnel or subway, and that in no event shall the height of the top of the floor of said tunnel or subway be more than two feet above the present grade of the macadamized portion of the present highway adjacent to said tunnel or subway, which shall be graded by the plaintiff on either side of said tunnel or subway, uniformly a distance of 100 feet for each two feet so raised; and provided further, that said plaintiff shall extend the width of the bridge over said tunnel or subway whenever the town authorities shall widen the macadamized highway approaching said tunnel or subway." Attached to the judgment is a plan or blueprint of the proposed bridge approved and authorized by the court to be constructed, the same being a duplicate of the plan or blueprint attached to the findings. This plan shows an open ditch fourteen feet wide with a depth in it of four and one-half feet of water, and a space between the water level and the overhead planking of the bridge of thirty inches. The bridge is to be of steel and concrete. It is given in front view and cross-section and is twenty-eight feet in width east and west or across the traveled part of the road and carries on its east and west sides a concrete or stone fence or guard. At the place proposed for this crossing of the highway the ground is level, and the fill of the highway is not over two feet above the natural level on either side.

This is called a tunnel or subway. It is in fact an open ditch sixty-six feet in length, fourteen feet wide, and four and one-half feet deep extending clear across the highway,

with the middle twenty-eight feet thereof, corresponding in width to the graded portion of the highway, covered by an ordinary bridge. It seems to be called a tunnel or subway for the purpose of bringing the case within sec. 1346, Stats. (1898), which provides:

"Any person owning land lying on both sides of any highway is hereby authorized to construct a tunnel under such highway, also the necessary fences for the passage of stock, and other purposes, to and through the same, in such manner as will not interfere with or endanger travel on such highway. All such tunnels shall not be less than twenty-five feet in length and shall be maintained by the person constructing the same, and the owner of such property shall be liable for all damages which may be occasioned by reason of the failure to keep the same in repair; provided, that the electors of any town at an annual town meeting may by vote authorize the construction of any designated tunnel therein of the length of not less than sixteen feet. The chairman of every town shall see that all tunnels in his town are made in accordance with the provisions of this section and that they are kept in good repair."

It was not the purpose of the plaintiff to construct any tunnel. He wished to dig a ditch across the highway fourteen feet wide and of sufficient depth to permit him to float ice from Lake Geneva across the highway to his ice house situated on the east side of the highway, and to construct a bridge over this ditch to accommodate the public travel along the middle or traveled portion of the highway. Manifestly he is in no wise aided by the tunnel statute above quoted, for the sufficient reason that this is not a tunnel. This ditch remains open the whole width of the highway, except that the twenty-eight middle feet thereof are spanned by the bridge in question.

I think under sec. 819, Stats. (1898), which provides that the supervisors shall have charge of all the affairs of the town not by law committed to other officers; by sec. 1223, which provides that the supervisors of the several towns shall have

the care and supervision of all highways and bridges therein, and that it shall be their duty to appoint town superintendents of highways, who shall under their direction construct and repair all highways and cause all obstructions to be removed therefrom, and empowers the supervisors to require the superintendents of highways from time to time to perform any of the duties required of the latter by law; authorizes the supervisors to assess the highway taxes, to divide their town into highway districts, and to lay out and establish highways; and by secs. 1224, 1225, and 1226 and other sections to exercise control over highways, the town supervisors have the decision of such matters. Sec. 1339 makes the town liable in damages for injuries caused by defects in the highway, and sec. 1330 authorizes the supervisors to order encroachments removed, and sec. 1326 orders their subordinates who act under their direction to cause obstructions to be removed. Consequently the supervisors in this state have and exercise by law a discretion in the matter of allowing such a ditch as here described to be constructed in the highway, and that discretion is not reviewable by the circuit court. I believe that under such statutes the law is correctly stated in *McCarthy v. Pennsylvania L. & I. Co.* 5 Pa. Super. Ct. 641, as follows:

"The control of streets or roads and the grades and changes made thereon are not to be determined by the abutting owners, but are by statute placed under the control of the local municipal authorities. It follows that an abutting owner has no right to take possession of a public road or street and change its grade without authority from the body having it under statutory control."

See, also, *Snively v. Washington Tp.* 218 Pa. St. 249, 67 Atl. 465, 12 L. R. A. N. S. 918; *Bybee v. State,* 94 Ind. 443; *Congreve v. Smith,* 18 N. Y. 79; *Lansing v. Smith,* 8 Cow. 146; *Comm. v. King,* 13 Met. 115. None of the other cases brought to our attention relative to the title of an abutting

owner in the highway subject to the public easement touch this question. I concede this title of such owner. Numerous *dicta* are quoted to us to support the judgment of the court below, but they are all beside the question. The case illustrates the prevalent vice of trying to build up law by a series of quotations detached from the subject matter under investigation in the instances in which the quoted language was employed. By all well considered precedents the public interest is paramount to that of the abutting owner. He holds subject to that public interest and statutes regulating it. I find it adjudged in *Davis v. Pickerell,* 139 Iowa, 186, 117 N. W. 276, that the landowner who has exercised the right granted by the supervisors and constructed a cattle-way under the highway cannot abandon the same and construct another at a different location without new action of the supervisors. This was adjudged under a statute which permitted the board of supervisors to grant the right to construct a cattle-way across, over, or under any public highway, and perhaps loses some force because of this form of the statute. The instant case depends in this respect upon the construction of our statutes, and if our statutes commit the care and control of the highways to the local boards of supervisors, it follows that any one invading and disturbing the surface of that highway or making excavations therein which might interfere with the public use of the highway between its boundaries, or cause liability of the town for damages, must obtain the consent of the administrative officers in control. The courts cannot give this consent. The power is by law lodged elsewhere and is discretionary. It will scarcely be claimed that the courts are authorized to award this judgment specially to *Mr. Lawler*. If not, then every abutting owner may cut the level highway by a ditch and build a bridge over the ditch as a matter of legal right, provided he can convince a court that such action will not seriously interfere with public travel. Each of *Mr. Lawler's* neighbors along this road

can do so. *Mr. Lawler* and each of his neighbors must cut through the beach which lies between ordinary high and low water mark, and which does not belong to him but to the state, in order to reach the navigable waters. The result is confusion. If I could imagine such power in the circuit court under our statutes this would be an improper case for its exercise. This power is not committed by law to the courts. Nor can the courts exercise administrative power, fix grades, approve plans, and regulate that which is given to other and different officers for regulation. The judgment herein is not a judgment but an exercise of administrative authority. The acts performed by the circuit court were administrative acts, as much so as laying out a highway, granting a saloon license, or fixing a plan for street railway tracks. It is not necessary to cite authorities in support of this proposition, but it is worthy of note that the jurisdiction which the circuit court, without any statutory grant of power, so easily assumed in the instant case was rejected and disclaimed by other courts even when the statute expressly conferred it. Such statutes were held unconstitutional as attempting to confer administrative power on the courts. *Norwalk St. R. Co.'s Appeal,* 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794; *Moynihan's Appeal,* 75 Conn. 358, 53 Atl. 903; *Spencer's Appeal,* 78 Conn. 301, 61 Atl. 1010; *Beard's Appeal,* 64 Conn. 526, 30 Atl. 775; *Smith's Appeal,* 65 Conn. 135, 31 Atl. 529; *Ives v. Goshen,* 65 Conn. 456, 32 Atl. 932; *Nash v. Glen Elder,* 81 Kan. 446, 106 Pac. 292. This is the rule of the federal courts also.

One of the grounds upon which Sir EDWARD COKE was removed from the office of Chief Justice of England was his interference by judicial decisions with the administrative duties of the commissioners of sewers. Chief Justice MOUNTAGUE, who succeeded him, was upon his appointment to that office admonished in the quaint style of those days to hear causes with patience; bear with the prolixity and impertinent

discourse of lawyers; ensue the good and eschew the evil examples; and to imitate the virtues of his worthy grandfather, Sir EDWARD MOUNTAGUE, who never vaunted that he would make *latitats latitare;* nor arrogated to himself the high title of Capitalis Justitia Angliæ; nor devised new constructions of laws against the commissioners of sewers, "disputing of tricks and moote points concerning taxes, and making new gutters or walls." Moore, 825 *et seq.*

I come to this conclusion on the hypothesis that *Lawler* owned a narrow strip of land west of the highway and between that and the waters of Lake Geneva. But I will add further that I have carefully examined the evidence as to such ownership, and I think it is shown almost to a demonstration that *Lawler's* land does not at the place in question extend west of the highway as laid out.

The appellants moved for a rehearing.

In support of the motion there was a brief by *John B. Simmons* and *Charles S. French,* attorneys, and *Thomas M. Kearney,* of counsel; in opposition thereto a brief by *Burr W. Jones* and *J. L. O'Connor.*

The motion was granted on March 12, 1912, and the cause was reargued on April 27, 1912.

For the appellants there was a brief by *Charles S. French, Simmons & Walker,* and *Thomas M. Kearney,* and oral argument by *Mr. Simmons* and *Mr. Kearney.*

Burr W. Jones and *J. L. O'Connor,* for the respondent.

The following statement of facts and opinion were filed June 4, 1912:

This is an action in equity brought by the owner of land bordering on the eastern end of Lake Geneva to enjoin the town supervisors of the town of Linn in Walworth county from hindering or preventing him from constructing a channel, or covered waterway, under and through a highway of the

town, and thus connecting the waters of the lake with the plaintiff's land on the east side of the highway. The first and fundamental question in the case is as to the correct location of the highway in question. It is admitted that it skirts the lake in front of the plaintiff's property, and the defendant supervisors claim that it extends to the eastern edge of the lake at ordinary high water, while the plaintiff claims and the trial court found that there is a strip of land or beach from twenty-five to thirty-five feet in width owned by the plaintiff between the west line of the highway and the eastern edge of the lake. It is admitted that if there be any land between the west line of the highway and the lake it belongs to the plaintiff.

The plaintiff makes three claims, viz.: (1) that he has the right to construct the channel or tunnel under a written permit alleged to have been given by the three supervisors of the town of Linn to one Dennison, plaintiff's predecessor in title, July 22, 1901; (2) that, inasmuch as the highway runs through his property, leaving part of his land on one side and part on the other, he has a common-law right to dig a ditch or channel across the highway and connect the two parcels by a waterway, building and maintaining such bridges as may be necessary to provide for public travel; (3) that he has a right to construct such a waterway under sec. 1346, Stats. (1898), which provides that "any person owning land lying on both sides of any highway is hereby authorized to construct a tunnel under such highway, also the necessary fences for the passage of stock, and other purposes, to and through the same, in such manner as will not interfere with or endanger travel on such highway."

The plaintiff desired to erect an ice house on his land east of the highway and wished to construct the channel from the lake across the highway for the purpose of floating ice from the lake to his ice house. Before bringing the action he presented to the defendant supervisors a communication claiming

the right to construct the way under the Dennison permit, and accompanied the communication with designs and specifications for two bridges across the traveled part of the highway, either of which he offered to erect, as the supervisors might deem best. The supervisors refused even to consider the request, and the plaintiff thereupon commenced this action and obtained a preliminary injunctional order from a court commissioner restraining the defendants from interfering with the construction of the channel, and commenced work thereon. Upon making answer to the complaint the defendants obtained an order to show cause why the plaintiff should not be restrained from proceeding with the work until the decision of the case on the merits, together with a temporary restraining order. By stipulation of the parties the *status quo* was allowed to remain during the pendency of the action. There was a contest upon the trial between surveyors as to the correct location of the highway, which it appears was originally laid out in 1839. The court found that there was in fact twenty-five feet of land belonging to the plaintiff between the highway and the edge of the lake, and held that the plaintiff was entitled to construct a tunnel or subway under the highway according to plans and specifications attached to the judgment and made part thereof.

The so-called tunnel or subway was in effect a bridge thirty-one feet wide over a water channel fourteen feet in width, extending across the highway. The bridge elevated the grade of the prepared way two feet, and the plaintiff was required to grade the highway 100 feet in each direction so as to bring it up to the proposed level of the bridge. The supervisors were enjoined from interfering with the plaintiff in the construction of the channel or tunnel, and from this judgment the defendants appeal.

WINSLOW, C. J. The reargument which has been had in this case has cast new light on the case, at least to the mind of

the writer of this opinion, and especially is this true with regard to the question of the location of the highway.

All the members of the court were convinced on the first hearing that no rights could be claimed under the so-called Dennison permit, and they are all of the same opinion now. There may be more than one good reason which can be given for this conclusion, but there is certainly one which is entirely sufficient, and that reason is that the permit was never granted at a meeting of the town board. The testimony shows without dispute that the members of the board signed it individually at different times and places, and that no action ever was taken at any meeting of the board, either regular or special. It is well settled that where an act must be done by a board the action must be taken at a meeting at which all are present, or of which all have had proper notice, in order to make the action binding. *McNolty v. Board of School Directors,* 102 Wis. 261, 78 N. W. 439; *Lisbon Avenue L. Co. v. Lake,* 134 Wis. 470, 113 N. W. 1099.

As has been said in the statement of facts, the initial and fundamental question in the case is the question of the location of the highway which skirts the eastern end of Lake Geneva and crosses the western end of the plaintiff's premises, which are 400 feet in width from north to south. The highway is frequently called the "beach road" by the witnesses, because it passes along the beach of the lake at only a slight elevation from the surface of the water for a distance of more than half a mile. If the western line of the highway reaches the edge of the lake in front of the plaintiff's premises he cannot successfully claim the right to construct the waterway and bridge in question, either under common-law principles or the provisions of the "tunnel" statute, because in either case it is necessary that the party claiming the right own property on each side of the highway.

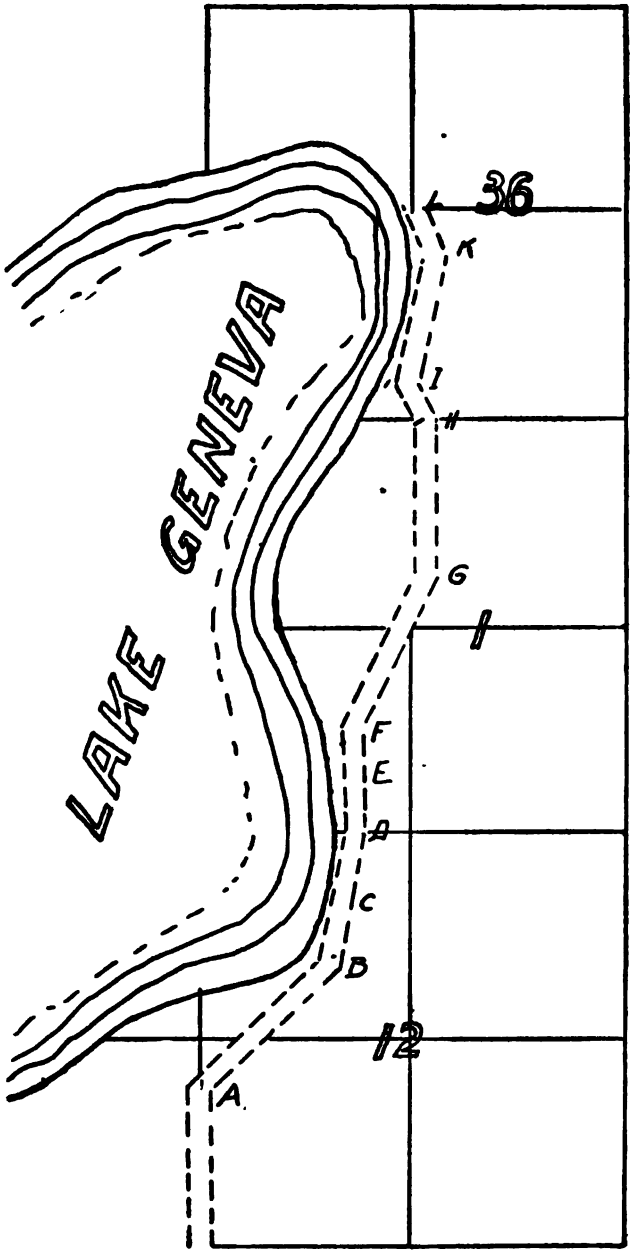
The road in question was four rods in width, and is admitted to have been laid out in 1839. In May of that year a

petition for the laying out of a highway, commencing at the village of Geneva and running southerly to the Illinois state line, a distance of more than six miles, was presented to the commissioners of Walworth county, and viewers were appointed who reported in October, 1839, in favor of the laying out of a highway pursuant to the petition, and accompanied their report with a map and survey made by a surveyor named Norris, who was also one of the viewers. The map and survey seem to have been accepted by the commissioners in the following January and ordered to be recorded, and the road was opened. The survey describes simply the center line of the highway and commences at the Illinois state line in the town of Linn at the southwest corner of section 35 in that town, proceeding thence north on the section line between sections 34 and 35 forty-six chains. It then diverges to the northeast through sections 35 and 26 to the southwest corner of section 24, thence north on the line between sections 23 and 24 one mile, between sections 14 and 13 one mile, and between fractional sections 11 and 12 nearly half a mile to a point four chains south of the quarter corner on the west line of section 12. From this point (which is designated by the letter A on the map on page 133) it proceeds in a general northeasterly direction around the east end of Lake Geneva, there being a change of course at each of the points marked on the map by the letters A, B, C, D, E, F, G, H, I, and K.

The changes of course at the points C, D, and E are so slight that upon a small map they are not very noticeable, but there is a substantial change at each place. It is quite evident from mere inspection of the map that from the point C to the point F there was a deliberate following of the shore of the lake for some reason. The courses D to E and E to F are north 4 degrees and north 9 degrees 15 minutes west respectively. There is, however, a narrow strip of land represented as intervening between the highway and the lake. The plaintiff's premises consist of a strip of land 400 feet in width from

north to south at the point D, 100 feet thereof being taken off from the south side of the southwest fractional quarter of section 1, and 300 feet thereof from the north side of the northwest fractional quarter of section 12. The survey attached to the map states that the line of the highway terminates "on the beach of Geneva Lake at the confluence of Center street of Geneva village plat with the Racine road" (the point marked L upon the map). It will be understood that the map herewith given is approximately a correct copy of that part of the map attached to the original survey which relates in any way to the present controversy, but that the letters A, B, C, etc., were not on the original map, but have been added for convenience of reference merely.

It appears by the testimony that in or about the year 1873 a considerable change was made in the north part of the highway. All that part lying in section 36 was discontinued and closed up, as well as about twelve or thirteen chains in length of the north end of that part which lies in section 1, and the course of the highway was radically changed so that, beginning at a point nearly midway between the points G and H, it diverges sharply to the northeast and enters the village of Geneva on the south line of section 36, between eleven and twelve chains east of the south quarter-section corner of said section. Since the original laying out of the highway in 1839 the same has been constantly in use and has for all that time been the principal and only reasonably direct highway connecting the town of Linn with the village of Geneva (now city of Lake Geneva). None of the original monuments, stakes, or witness trees are now in existence. The surveyors who were sworn for the plaintiff and those who were sworn for the defendants commenced their surveys at the point A, and substantially agree that it is correctly located in the middle of the present traveled track of the highway. They also seem to agree that the first two courses of the road from A to C have been changed so that the road runs further to the west


36
K
I
H
G
LAKE GENEVA
F
E
D
C
B
12
A

than originally laid out. There has also been a change of the courses between F and G. Mr. Teeple, a civil engineer who made the principal survey for the plaintiff, testified that he found the quarter-section corner on the west side of section 12 without difficulty, and commenced his survey at a point four chains south of that point on the west line of section 12, which line was practically the center of the highway as traveled. Using this line as his meridian, he ran a random line over the courses and distances named in the original survey of the road to the point H, where the road enters section 36. He found on consulting his copy of the original survey that this point was described as being 125 links east of the quarter-section corner on the south line of section 36, and, finding no stake in existence showing that corner, he proceeded to relocate the same from a monument which he found on the southeast corner of the section. From beginning to end of his random survey he found no stakes nor bearing trees, but ran the entire line simply by transit angles and checked by compass readings. On locating the quarter-section corner by measurement from the southeast corner, he measured 125 links eastward from the corner so located and arrived at a point sixty-two and one-half feet east of his random line location of the point H. He then swung the whole random line over to the east, using the point A as the axis of the movement. At H the line was swung over sixty-two and one-half feet, and at the intermediate angles between H and A the distance of the swing eastward was determined according to the rules of proportion used by surveyors in such cases. Proceeding back southward over the line to make the corrections at the various angles, he found nothing in the way of witness or bearing trees to corroborate his new line at G or F, but found what he thought was the rotted remains of an oak stump near the angle E at a point about seven feet to the east of where the witness tree should be if the corrected line was right. Deeming this the witness tree named in the original survey, he then

swung the line seven feet further eastward at this point. At D he found some decayed roots of a tree in the swamp which he thought indicated that there had been a tree at a point about a foot or two from the location of the witness tree named in the notes, assuming that his corrected line was right. Not feeling certain of its exact location, however, he made no further change at D on account of the supposed witness tree, but used the new point at E to re-establish or correct the points D and C in the same manner that he had used the point H. He found no stakes or witness trees at B or C. The corrected line thus established by the witness Teeple is the line which the court found to be the center of the highway. In regard to this survey a number of facts, some of which appear from the evidence of Mr. Teeple himself, are pertinent. Mr. Teeple made no particular examination as to the lines of ancient occupation at any point along the route. At the point C his original random line is ten or twelve feet west of the center of the highway as traveled. From this point northward the random line runs more and more to the west of the traveled track and runs into the edge of the lake between E and F. At no place does he attempt to follow the line of the present traveled highway. At E the random line was moved thirty-six feet on account of the swing eastward made necessary by the change at H and the finding of the witness tree at E. At D the swing eastward was twenty-eight and one-half feet from the random line, and at C twenty-one and one-half feet. The corrected point E is somewhere from ten to fifteen feet east of the center of the present macadamized traveled track, which is about twenty-two feet in width. The corrected point D is about thirty-three feet east of the center of the present traveled track. From the south line of the plaintiff's land (400 feet south of D) to the north line of his land (100 feet north of D) Mr. Teeple's corrected line is continuously to the eastward of the entire roadway as traveled from time immemorial, the greatest distance being at D,

where it seems to be somewhere from seventeen feet to twenty feet. In determining the section line between sections 1 and 12 Mr. Teeple found a stone monument near the point D. This monument was set under the fence between the two sections to mark the dividing line between the two sections by a surveyor named Beckwith many years ago. Mr. Teeple's point D as corrected is four feet north and *one foot* to the west of that monument. This monument is about on the line of an old north and south fence extending about 150 feet northward from the south line of the plaintiff's property as well as upon the line of a well defined line of trees and bushes which taken together have for many years formed the apparent east boundary of the highway in front of plaintiff's property. For most of the distance between the south line of the plaintiff's land and the point F there is and always has been a low ridge running along the margin of the lake on which the traveled highway always has been located, and to the east of this low ridge is a marsh. It is claimed by the defendants that the point E as corrected is in fact in the marsh, and the point D either in it or close to its edge. While it does not seem possible to exactly verify this claim, it is entirely certain that both of these points fall considerably to the eastward of the ridge and either in the marsh or on its margin. We are unable to ascertain from the evidence how Mr. Teeple's corrected line agrees with the lines of occupation at G and northward, because he admits that he paid no attention to such lines, and we do not discover that he gave any testimony even as to the approximate line of occupation at this point. Finally Mr. Teeple says that which is quite manifest, namely, that after fixing the point H his entire subsequent survey depends for its accuracy on the manner in which that point was fixed.

The defendants' surveyors did not attempt to make so ambitious a survey as Mr. Teeple's. Mr. William Powrie, a civil engineer, testified that he started from practically the same point on the south as Mr. Teeple, using the west line of

section 12 as a meridian, and ran courses northward according to the calls of the original survey. He also ran into the edge of the lake at about the point E. He became satisfied that there was a discrepancy somewhere from the fact that on computation of the eastings in the original Norris survey he found they amounted to but 38.73 chains up to the point H on the north line of section 1, and yet, according to the survey, this point was 125 links east of the quarter-post. He concluded that the last course on the survey, instead of being "north 28 chains and 50 links to a stake 125 links east of the quarter corner," was not due north, but "northerly" to the point named. He then attempted to locate the north quarter corner of section 1 by measuring forty chains west from the northeast corner of the section, but the measurement brought him into a grass plat in front of a residence where there were no indications of stakes, or monuments, or bearing trees, and no possibility of making search by way of excavations. From his forty-chain point he measured to the lake in an attempt to find the meander corner, and found the distance to be 5.29 chains, instead of 7.26 as stated in the original survey. He concluded that it was impossible to accurately locate the point H. He then concluded to survey that part of the road skirting the lake only, assuming that Norris made the original survey using the true meridian as required by the United States Statutes—Act of May 18, 1796 (1 U. S. Stats. at Large, 464: R. S. of U. S. sec. 2395)—instead of the magnetic meridian (which, according to the note in the survey, had a variation at that time of six degrees east). Carrying out this idea, he took the proper observations on Polaris and the sun, found the true meridian, located the angle at C by this meridian, and found that point to be practically in the center of the traveled track. He then ran the line according to the notes of the original survey to the point F. This line lay on the traveled track from C to a point about 725 feet north of C, and about opposite the place where the channel is

to be located it diverges to the east of the traveled track for a distance of about 200 feet, the point D being about the middle of this last named stretch. At the point D the line so run is fifteen and one-half feet west of the stone monument on the east side of the road mentioned above in the description of Mr. Teeple's survey. At the north line of plaintiff's premises is another stone monument which is in line with trees and bushes apparently marking the east border of the highway, and Mr. Powrie's line is twenty-two feet west of the last named monument. As the line reaches the angle E it is exactly in the center of the traveled track, and at F is fourteen feet west of the center of the traveled track. Mr. Powrie was of opinion from the results obtained by him in using the true meridian that Mr. Norris used that meridian in his original survey.

Some pertinent facts are to be noted with reference to the Powrie survey. So far as concerns that part of the road which skirts the lake (and this is the principal part of the road which has never had its course changed by official action), it comes much nearer to the lines of actual travel which have existed from time immemorial than the Teeple line. At the only points where there are any monuments it agrees more nearly with them than the Teeple line. At the point E there was a small inlet into the lake when the original survey was made, and the notes of the original survey state that a stake was planted on the north back of the inlet. A small bridge was at once constructed at this point and retained for a good many years, but finally was moved south some distance and the channel filled up. It seems natural that the bridge should have been constructed in the right place, for the stake was doubtless then in existence, and, if so, then it seems quite certain that the traveled road at this point is in the right place, and the evidence is clear that Mr. Powrie's line is in about the center of the traveled road at E. Again, the Powrie line

at no point invades the swamp before spoken of, but follows the ancient ridge for practically the entire distance.

There was another survey made by an engineer named Carlson, which agreed substantially with Mr. Powrie's, but adds nothing materially to the strength of Mr. Powrie's position. Mr. Teeple was assisted in his survey by a civil engineer named Haskins, whose testimony corroborates that of Mr. Teeple as to the manner of the survey, but adds nothing materially to it. Prof. L. S. Smith of the College of Engineering of the University of Wisconsin also consulted with Mr. Teeple after the latter's survey, and made examination as to the remains of witness trees at D and E, corroborating Mr. Teeple's claims as to the probable location of those supposed trees. He also corroborated Mr. Teeple as to the proper method of correcting a random survey when no monuments or stakes are to be found.

After all is said and done, however, it must be admitted, we think, that the evidence of the surveyors is not very satisfactory. Were it not for other facts now to be considered, we certainly should not feel called upon to interfere with the findings of the trial court. One important fact, however, has developed from examination of the exhibits since the trial and decision of the case below which would have presented quite a different question to the trial court. It was assumed from start to finish that the point H was located by Norris 125 links east of the quarter-section corner on the south line of section 36. Mr. Teeple's entire corrected survey is founded on this fact. It now appears that it cannot be determined whether the distance was 125 links or 1.25 links. The question is, Was there a decimal point between the 1 and the 2 or not? Two maps and surveys of the road were found to be on file in the office of the county clerk. Both seem to be originals, and they seem to be substantially identical, except that in one the point H is described as "125 links" east of the quarter corner, and in

the other very plainly as "1.25 links" east of the same corner. One is indorsed "Minutes of road in Geneva filed this 6th day of October, 1840, ordered to be recorded," with the word "recorded" below; the other is indorsed "Report of James A. Maxwell, Edward Norris, accepted this 7th day of Jan. 1840, ordered to be recorded." Both are dated October 24, 1839.

It is said by respondent that there is a description of the highway in the records of the county surveyor's office without a map which fixes the stake 125 links east of the quarter corner, but it is admitted that this was not introduced in evidence, although it was referred to by the surveyors in their evidence. Mr. Norris, it appears, was county surveyor when the survey was made. It is said by the respondent that the 1.25 is a palpable mistake; that no surveyor would make a line terminate a distance of 1.25 links, or about ten inches, from a quarter corner. In corroboration of this contention they point to another distance in the survey where the distance to a bearing tree is given as 151 links in one survey and 1.51 links in the other, and they say that no surveyor would measure such a distance as the hundredth of a link. They then suggest that the first document described was intended to correct the second. These considerations seem plausible, and there are others which might be named, but nevertheless we must face the fact that we do not certainly know which distance is correct. It may be more probable that 125 is correct, but it is not certain. This adds an element of confusion and doubt not present when the findings of fact were made, and what effect it might have had upon those findings we cannot know. The entire situation forcibly illustrates the danger of trying to relocate old lines by running courses and distances with no known monuments as guides. Mr. Teeple finds some remains of roots seven feet from where they should be, and he conjectures that they are the roots of the witness tree described as existing more than seventy years ago; Mr. Powrie finds the call of 125 links does not correspond with the statement of eastings, and he conjectures that

Mr. Norris used the true meridian instead of the magnetic; and now we are urged to conjecture that 125 is the true number of links rather than 1.25. This does not seem in any respect satisfactory. The principle is very familiar that resurveys of ancient lines by courses and distances, paying no attention to ancient occupation, is not a satisfactory method of arriving at the line. It has been correctly said that such surveys are entitled to little weight as against practical location of the line by fences or by occupation for a long series of years. If there be no original monuments in existence, but it appear that there has been occupation and that fences have been maintained for many years, it will be assumed that the lines of such occupation agree with the original occupation taken in accordance with the original survey soon after it was made while the stakes or monuments were in existence. This principle has been applied to highways as well as to lands privately owned. *Vernon v. Nicolai,* 125 Wis. 319, 103 N. W. 1111. It is a beneficent principle in that it makes for repose and settlement of rights, rather than for the reopening of acrimonious and expensive disputes with every new survey. It is a correct principle in that in the majority of instances it doubtless reaches results more nearly in accordance with the original survey than any other method.

In the present case we are convinced that there is such cogent proof of practical location of the highway in question in front of the plaintiff's premises that it must be held to overcome the testimony of the surveyors and settle the question adversely to the plaintiff's claim. Especially does this result seem inevitable in view of the fact of the uncertainty of the location of the point H, upon which the accuracy of the Teeple survey wholly depends.

The facts as to this practical location are substantially undisputed and the more important facts may be briefly summarized as follows: The highway is a main traveled thoroughfare by which the inhabitants of the entire country south of the lake approach the city of Lake Geneva, and has been such

ever since it was laid out. For about half a mile it skirts the shores of Geneva Lake and has always been known as the "beach road," because it lies but little removed from the beach and only a few feet higher than the lake. As far back as any witness can remember, and many were called whose memory ran back thirty and forty or more years, the traveled way, about twenty feet wide, has existed along this half mile of highway practically in the precise place in which it now is. Twenty-five or thirty years ago it was thoroughly macadamized by private enterprise, so that a roadbed twenty-two feet in width, placed directly over the old track, has existed since that improvement. There has never been any fence or evidence of private occupation on the west side of this traveled track in front of the plaintiff's premises, nor does it appear that any one ever exercised any act of ownership there. There has always been a grassy strip of ten or twelve feet next to the traveled track, and then a beach varying in width from five or six feet at ordinary high water to ten or twelve feet at extreme low water. On the east side of the traveled track there has likewise always existed a grassed space of from twenty to thirty feet in width (the widest point being at D) which has always apparently been a part of the highway. This space in early days was bounded by a rail fence succeeded by others of various kinds, which, while not making a mathematically accurate line, have all been substantially at about the same distance from the traveled track and at the edge of the grassy strip. An old post and board fence still remains on this line in front of the south 160 feet of the plaintiff's premises. The grassy strip on the east side of the track has also been further bounded on the east by a thicket of trees and shrubbery in front of plaintiff's premises coming out to the line of the old fence and by the marsh or slough further north toward the point E. The only witness who testified as to the distance of this old fence from the water in front of the plaintiff's premises stated that he measured the distance at the point D in October, 1909, and found it to be eighty-one feet. He also

testified that at the place where the tunnel was begun it was seventy-two feet seven inches, and on *Mr. Lawler's* south line seventy-three feet. What the height of water was at the time does not appear, but presumably it was low. Thus it appears to be established beyond controversy that for an indefinite time in the past, probably well toward seventy years, there has been an open space of about four rods in width here, extending from the fence and thicket to the lake, having a twenty-foot traveled track near its center and bearing every appearance of an ordinary country highway for its full width, and further that no one has ever (until the present time) set up a claim to any part of the space as private property.

This seems to us very strong evidence of practical location of the highway, a location which ought not to be upset by a mere survey depending on courses and distances, especially when such survey is founded upon a conjecture as to the location of a controlling point.

Furthermore, it appears that over this entire open space of approximately four rods in width the public has always, so far as any one can remember, exercised the right of travel, diverging from the traveled track when it was heavy and driving either on the grass to the east, or on the grass or hard sandy beach on the west, also driving into the water to water horses or set wagon tires, and in winter driving on to the ice to seek a shorter route to town. These latter acts are not particularly persuasive in themselves alone, but in connection with the other evidence as to the appearance and use of the entire strip they help to give character to that use.

We are not unmindful of the fact that upon the original map there appears to be a strip of land between the road as laid out and the lake, nor of the fact that the center of the highway at the point H appears to be considerably more than 1.25 links east of the quarter-post. These are facts entitled to be considered, but we have been unable to consider them as at all controlling.

The great and overshadowing fact remains that for nearly

or quite three score years and ten there has existed a strip of land about four rods in width which has had every appearance of a highway, and has been used as a highway for its whole width, and which has never been claimed as subject to private ownership, but has had a boundary on the one side of a fence and on the other of a navigable lake.

We do not consider it necessary to split hairs as to the exact width of this strip. At times when the water has been low it seems to have been a few feet more than four rods in width; at other times it has doubtless been less. It is quite difficult, if not practically impossible, to fix the exact point of ordinary high water where the bed of the lake begins. *C. Beck Co. v. Milwaukee,* 139 Wis. 340, 120 N. W. 293. We regard the whole strip opposite the plaintiff's premises from the fence and thicket line westward to ordinary high-water mark as constituting the highway by practical location which has existed unchallenged for so many years that it would be unjust to the public to now change the lines because of surveys whose accuracy can never be demonstrated.

We hold, therefore, that under the evidence the plaintiff owns no land west of the highway, and hence has neither a common-law nor statutory right to a tunnel or channel under or across the highway. This renders it unnecessary to pass upon any other questions presented.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for defendants, dismissing the complaint with costs.

VINJE, J., took no part.

The following opinion was filed June 10, 1912:

TIMLIN, J. The point covered by and decided in the opinion of the court written by Chief Justice WINSLOW is included in and part of the more comprehensive theorem ad-

vanced by Justices SIEBECKER, KERWIN, and the writer on the first argument. We all understand, I think, that where there are different, opposite, abutting owners, the title of each, subject to the public highway easement, extends to the center of the highway. But where one person owns abutting land on both sides of a highway, or where a person owns land abutting on one side of a highway, which highway extends in width from such land to or below ordinary high water of a navigable body of water, he owns all the land covered by the highway, subject to the highway easement. To the learned lawyer this note is entirely unnecessary; but there are others to whom it may be a benefit.

The following opinion was filed June 20, 1912:

BARNES, J. (*dissenting*). The conclusions reached by the court in this case are summarized in the final paragraph of the opinion, where it is said: "We hold, therefore, that under the evidence the plaintiff owns no land west of the highway, and hence has *neither a common-law nor statutory right to a tunnel* or channel under or across the highway." (The italics are mine.)

I believe the decision is contrary to well settled principles of law and that the court in reaching its conclusion has overturned findings of fact made by the trial judge which were not only well supported by the evidence but were sustained by the decided preponderance of proof. I think the plaintiff was entitled to judgment independent of the tunnel statute and regardless of whether or not he owned land between the road and the lake. If the tunnel statute be held to confer a new right rather than to regulate the exercise of an existing one, then I think the plaintiff was entitled to relief under that statute because the proposed construction was a tunnel and the plaintiff did own land on both sides of the highway as well as the highway itself. The case is an important one,

and I cannot help thinking that the court has wandered far afield from long established legal rules in deciding it. The respective interests of the public and an abutting owner in the highway have been fixed by a well nigh uniform current of authority. Where the right of the public ends and that of the abutting owner begins, has been just as firmly established. Whenever a conflict arises between these two, there is always one and only one question to be determined, and that is, Does the use which the owner proposes to make of his property unreasonably interfere with the use and enjoyment of the public easement therein?

The plaintiff owns the fee in the highway and the public has a mere easement across his land. *Andrews v. Youmans,* 78 Wis. 56, 47 N. W. 304; *Wegge v. Madler,* 129 Wis. 412, 109 N. W. 223; *Smith v. Beloit,* 122 Wis. 396, 100 N. W. 877; *Brown v. Baraboo,* 98 Wis. 273, 74 N. W. 223; *Chase v. Oshkosh,* 81 Wis. 313, 51 N. W. 560; *Donohoo v. Murray,* 62 Wis. 100, 22 N. W. 167; *Pettibone v. Hamilton,* 40 Wis. 402. It is conceded that *Lawler's* land runs to the lake, so he owns the fee in the highway whether the lake forms its western boundary line or not.

The right of the public in a highway is well defined. It has the right of passage. It may cut down elevations, fill depressions, grade the roadway, and make reasonable use of the material which it finds on the right of way for construction and repair work. It may improve and fit for travel so much of the right of way as it sees fit, and prevent obstructions in or encroachments on the road that would endanger or materially interfere with travel. On the other hand, the owner of the fee has the right to use his land for all purposes consistent with the enjoyment of the easement acquired by the public. 37 Cyc. 207, and cases cited in note 1.

"The public have simply an easement, a right of passage along the highway, but not the right to make a pasture of the road. . . . And as a general rule in this state, the fee of the

highway belongs to the owner of the adjoining ground, subject to this easement or right of passage in the public." *Harrison v. Brown,* 5 Wis. 27, 31.

An individual has no right to pile wood along the unused portion of a highway against the protest of an abutting owner. "To establish any such right as incident to a public easement, would be a flagrant violation, not only of the rights of landowners, but of the public also." *Orton v. Harvey,* 23 Wis. 99, 102.

The owner of a city lot, having an estate in fee to the center of the adjacent street, has a right to the enjoyment of any use of his estate, consistent with the servitude to which it is subjected. And where such owner has occasion to build thereon, he may lawfully unload his materials and earth within the limits of the street, taking care not to improperly obstruct the street, provided he removes such material within a reasonable time. *Hundhausen v. Bond,* 36 Wis. 29. To the same effect are *Gardiner v. Tisdale,* 2 Wis. 153; *O'Linda v. Lothrop,* 21 Pick. 292; *Clark v. Fry,* 8 Ohio St. 358; *Storrs v. Utica,* 17 N. Y. 104; *Chicago v. Robbins,* 2 Black (67 U. S.) 418.

The abutting owner has a right to use the subsurface of the street for legitimate purposes, provided such use does not interfere with the right of the public in the street. *Papworth v. Milwaukee,* 64 Wis. 389, 25 N. W. 431.

The correctness of these decisions of our own court has never heretofore been questioned. The principles thereby established are abundantly supported by the decisions of other courts.

The owner of the soil over which a highway is located is entitled to the entire use of the land, except the right which the public has to use the land and materials thereon for the purpose of building and maintaining a highway suitable for the safe passage of travel. And the public have no right to take materials from the right of way for any purpose other

than the building and maintaining of the same. *Cole v. Drew,* 44 Vt. 49, 8 Am. Rep. 363.

The abutting owner is "entitled to the timber and the grass which may grow upon the surface, and to all minerals which may be found below it." *Barclay v. Howell's Lessee,* 6 Pet. 498, 513.

The original owner "has a right to the freehold and to all the profits which may be derived from it, consistently with the right of passage of the public,—to all mines beneath the surface, to all trees, grass and pasturage upon and above the surface." *Tucker v. Eldred,* 6 R. I. 404.

"The public acquires a right of way with the powers and privileges incident to that right, such as digging the soil, using the timber and other materials found within the limits of the road, in a reasonable manner, for the purpose of making the road and its bridges. The former proprietor of the soil still retains the exclusive right in all the mines, quarries, springs of water, timber and earth, for every purpose not incompatible with the public right of way." *Pemberton v. Dooley,* 43 Mo. App. 176.

A right of way existing in the public over land for a highway is a right of passage, and not a right to get water in the streams or springs on the soil of the landowner, and a spring in a public highway is not a part thereof, nor is its use an incident to the use of the road, and the landowner has a right to fence it off from the public use as long as the use of the highway is not thereby unreasonably interfered with. *Old Town v. Dooley,* 81 Ill. 255; *Tacoma S. D. Co. v. Chicago,* 247 Ill. 192, 93 N. E. 153.

The abutting owner has the right to remove gravel from the right of way unless the material so taken is necessary for the construction or repair of such roadway, provided the roadway is not materially injured by removing such gravel. *Glencoe v. Reed,* 93 Minn. 518, 101 N. W. 956, 67 L. R. A. 901.

And where a city entered into a contract for street grading and permitted the contractor to clear and take away the rock found in the part of the street covered by the contract, it was held that the owner of the fee was entitled to recover the value of the rock so taken away, it appearing that it was not necessary to remove the rock for the purpose of grading or improving the street, it being located below the grade line. *Rich v. Minneapolis,* 37 Minn. 423, 35 N. W. 2.

The owner of the fee has a right to sell sand from a bed located on one side of the traveled road, provided no injury is done to the highway by such removal. *Williams v. Kenney,* 14 Barb. 629.

The building of a pipe line along a highway does not come within the use for which the highway was intended; the owner has the right not only to expel those who are engaged in the unlawful work, but also the right to tear up and remove the pipes which they have placed in his land. *Consumers' G. T. Co. v. Huntsinger,* 14 Ind. App. 156, 39 N. E. 423.

A contractor for the construction of a sewer is liable to the owner of the fee for the value of stone taken from a ledge in the street which it was not necessary to remove for the purpose of constructing the sewer. *Viliski v. Minneapolis,* 40 Minn. 304, 41 N. W. 1050.

Where the public authorities had piped water from a spring on the side of a highway to a public drinking trough, the abutting owner undertook to take up the pipes and was restrained from so doing by the town authorities. The court said that subject to the public easement the abutting owner "may take trees growing upon the land, occupy mines, sink watercourses under it, and generally has a right to every use and profit which can be derived from it, consistent with the easement, and when disseized (as he may be) can maintain ejectment and recover possession subject to the easement, and can also maintain trespass for any act done to the land not necessary for the enjoyment of the easement, which would be actionable injury if the land was not covered by the highway.

. . . In the case before us, as between the public and the respondent, the owner of the spring, the latter is entitled to any and all uses of it which do not interfere with the public safety, do not obstruct or hinder public travel, and do not increase the public burden of making repairs. If, therefore, the officers can at the same cost make and keep the way equally safe and convenient, and still allow the water to flow from the spring over and upon the land of the owner of it, it is their duty so to do. The right of the owner to the use of the spring under these limitations takes precedence of the right of the officers to divert it to the lands of others, if in so doing their sole motive is to establish a public watering place. Of course such places afford great relief to man and beast; but, commendable as is the act of establishing them, towns have no right to take private property without compensation for that purpose." *Suffield v. Hathaway,* 44 Conn. 521, 526, 527.

"When the sovereign imposes a public right of way upon the land of an individual, the title of the former owner is not extinguished; but is so qualified that it can only be enjoyed subject to that easement. The former proprietor still retains his exclusive right in all mines, quarries, springs of water, timber, and earth, for every purpose not incompatible with the public right of way." *Jackson v. Hathaway,* 15 Johns. 447, 452.

Other cases holding a like doctrine are *Chamberlain v. Enfield,* 43 N. H. 356; *Holden v. Shattuck,* 34 Vt. 336; *Overman v. May,* 35 Iowa, 89; *Board of Comm'rs v. Beckwith,* 10 Kan. 603; *Winter v. Peterson,* 24 N. J. Law, 524, 61 Am. Dec. 678; *West Covington v. Freking,* 71 Ky. 121; *Phifer v. Cox,* 21 Ohio St. 248; *Bolling v. Mayor, etc.* 3 Rand. (Va.) 563; *Highway Comm'rs v. Ely,* 54 Mich. 173, 19 N. W. 940.

Proceeding now to what might be termed cases directly in point, that is to say, cases where the foregoing principles were applied so as to give the abutting owner the right to construct ditches and carry watercourses in and across a highway, we find that they are uniformly to the effect that the

right exists, provided its exercise does not unreasonably interfere with the enjoyment of the public right.

The common-law right of an abutting owner to cut a ditch so as to carry a raceway across a highway is recognized and impliedly sanctioned in *President, etc. v. Mann,* 59 Wis. 69, 17 N. W. 972, where it is held that when such a channel is cut the owner of the raceway is liable for the maintenance of the bridge.

"The owner of the soil traversed by the highway had the right to construct a watercourse across it. . . . This familiar and well settled rule of law does not in our opinion grow out of the feudal tenure, or any peculiarity in the laws of England in relation to the duties of parishes, as argued by the defendant's counsel, but results, as we think, from the fact that the public right is a mere easement, and the owner of the soil, as such, can lawfully do anything upon it that does not interfere with the public easement." *Inhabitants of Woburn v. Henshaw,* 101 Mass. 193, 198.

To the same effect are *Perley v. Chandler,* 6 Mass. 454, and *Adams v. Emerson,* 6 Pick. 57.

The owner of land through which a public road runs may cut a passage across the road for the purpose of draining his land or running water to his mill, because the land is his own, but in doing so he must not injure the public easement, and to preserve it must construct bridges over such ditches where they cross the road and must keep the same in repair. *Woodring v. Forks Tp.* 28 Pa. St. 355.

Later it was held by the same court that the owner of land adjoining a highway may cut a ditch across the road, but he must, by bridging or otherwise, make the highway as safe for travel as before. *Phœnixville v. Phœnix Iron Co.* 45 Pa. St. 135.

The general rule is laid down in 15 Am. & Eng. Ency. of Law (2d ed.) 419, as follows:

"The owner of the fee may sink a drain or watercourse below the surface of the highway, or make any other excavation

therein, provided he takes proper precaution to cover it so as not to interfere with the safety and convenience of travelers."

The owner of land through which a highway passes may dig a ditch across such highway, but if he does he must by bridging or otherwise keep the highway as good and safe for travel as before. The court said the defendant certainly committed no trespass in digging the ditch.

"It was his own soil. The only right adverse to his was one to have a common highway for the purpose of travel. All the public could require was, that he should make and keep the road as good as it was before he dug his ditch. That he accomplished by building a substantial bridge originally, which did not get out of repair for a number of years. The road, however, in the end, proved to be less safe than it was when the bridge was first built, certainly less so than before the ditch was dug. In suffering this, the defendant came short of his obligation to the public." *Dygert v. Schenk,* 23 Wend. 445 (op. by COWEN, J.).

The owner of the fee in a public highway may sink a watercourse under it for use in connection with the adjoining premises where the highway is not thereby rendered unsafe. *Clay v. Hart,* 25 Misc. 110, 55 N. Y. Supp. 43.

The owner of the fee in a public highway may dig ditches therein to drain his lands, provided his acts do not render the highway less safe, useful, or convenient for the public. *Nelson v. Fehd,* 104 Ill. App. 114; affirmed in 203 Ill. 120, 67 N. E. 828.

"It is well established in this state, in conformity with the principles of the common law, that a highway is simply an easement or servitude, conferring upon the public only the right of passing over the land on which it is laid out, and, as an incident of such right, that of using the soil and the materials upon it in a reasonable manner for the purpose of making and repairing it. The title of the owner of the land is not extinguished, but is simply so qualified that it can only be enjoyed subject to the easement. He retains the fee and all rights of property in the land not incompatible with the

public enjoyment of the right of way, and whenever the highway is abandoned or lost, the entire, exclusive, and unincumbered enjoyment reverts to him. Subject to this right of the public he may take trees growing upon the land, occupy mines, *sink watercourses under it,* and, generally, has a right to every use and profit which can be derived from it consistent with the easement. . . ." *Woodruff v. Neal,* 28 Conn. 165.

The same question was before the South Carolina court, and it was held by that court that the abutting owner had the right to carry a conduit for water under the highway. *Baring v. Heyward;* 2 Speers (S. C.) 553.

The owner of a raceway adjoining a public street may lawfully increase the flow of water to his mills so long as the safeguards erected by the public remain sufficient. *State v. Society, etc.* 46 N. J. Law, 274.

Where a defendant was the owner of the land within the limits of a country highway, subject only to the public easement, and the land contained a valuable deposit of sandstone, defendant was not required to maintain the highway unobstructed to its full width so as not to interfere at all with the use of the highway for public travel as a condition of its right to remove the sandstone, but was only required to keep a passageway open and in good repair within the limits of the highway on the surface of the ground or by a bridge of width sufficient to enable teams to pass each other. *Clarendon v. Medina Q. Co.* 92 N. Y. Supp. 530, 1148.

Since the public has only an easement of use in a highway, and the fee rests in the abutting owner, he may make such use of the land within the highway as will not interfere with its use by the public. Such owner may use the highway on which to maintain irrigation ditches for the benefit of his land, provided he does so without creating a nuisance or interfering with its use as a highway. *Holm v. Montgomery,* 62 Wash. 398, 113 Pac. 1115.

The state of Oklahoma passed an act forbidding firms or

corporations to pipe natural gas outside of the borders of the state, and provided in the law that no pipe line intended for such purpose should be laid in or across any of the public streets or highways of the state. It was held that the act was void and that it was beyond the power of the state to prohibit the laying of pipes in the streets where they did not materially interfere with the public use, and that any such prohibition as was attempted would operate to deprive the abutting owner of property without due process of law. *Kansas N. G. Co. v. Haskell,* 172 Fed. 545, affirmed *West v. Kansas N. G. Co.* 221 U. S. 229, 31 Sup. Ct. 564. This case is very significant, because the legislature attempted to deprive the abutting owner of the right which the plaintiff sought to exercise here, and the court held the legislature had no such power.

I am at a loss to know upon what theory it is claimed that the abutting owner has no common-law right to construct a ditch in a highway simply because he does not own land on both sides of the road. So long as he confines his activities to the part of the highway which he owns in fact, he may make any lawful use of it which he sees fit, provided that by so doing he does not unreasonably interfere with the public use. To say that he cannot do this, is to deprive him of the use of his property without compensation and for a purpose that is not public. Admittedly the plaintiff owned the land over which the road was built to the ordinary high-water line. He had the right to construct his ditch to this point if by so doing he did not interfere with the public easement. Even if he were obliged to stop there, the ditch might be of great use to him in the transportation of ice to his ice house. He is denied the right to use his property to the ordinary high-water mark. This denial is not put upon the ground that the proposed ditch would materially affect the enjoyment of the easement of the public. The trial court found that it would not. This finding is not attacked in any way in the

decision of this court. It is amply sustained by the evidence. Every legitimate public interest has been carefully safeguarded by the judgment. The plaintiff was required to make his ditch safe and secure and to widen the concrete bridge whenever required to do so. He was also required to give a bond to keep the bridge perpetually in a good state of repair. In fact there is very little serious contention on the part of appellants' counsel that there would be any impairment of the use of the highway by the construction of the ditch. The town board did not refuse to grant the plaintiff the permission which he sought because it conceived that the use of the highway by the public would be affected by the ditch. The plaintiff's land is located near a number of very costly summer residences. An ice house in their midst would no doubt be something of an eyesore to persons of artistic tastes and temperaments. The town board elected to cater to these tastes rather than to the commercial and plebeian desires of the plaintiff. But the plaintiff purposed entering upon a perfectly legitimate business on his own property. He is precluded from exercising that right without a cent of compensation and without an iota of justification, as I view it.

I have stated that the plaintiff had a clear right to carry his ditch to the ordinary high-water line of the lake. Although the question is not very material, I do not for a moment concede that he was obliged to stop there. He had the right to cut the banks and connect his ditch with the lake, provided that by so doing he did not interfere with the public right of navigation or of hunting or fishing. The riparian proprietor on a navigable lake has certain well defined rights and privileges peculiar to himself, which extend beyond his boundary line and into public waters.

A riparian proprietor on a navigable lake

"has the right of exclusive access to and from the waters of the lake at that particular place; he has the right to build piers and wharves in front of his land out to navigable waters

in aid of navigation, not interfering with the public use. These are private rights incident to the ownership of the shore, which he possesses, distinct from the rest of the public. All the facilities which the location of his land with reference to the lake affords, he has the right to enjoy for purposes of gain or pleasure; and they oftentimes give property thus situated its chief value. It is evident from the nature of the case, that these rights of user and of exclusion are connected with the land itself, grow out of its location, and cannot be materially abridged or destroyed without inflicting an injury upon the owner which the law should redress. It seems unnecessary to add the remark, that these riparian rights are not common to the citizens at large, but exist as incidents to the right of the soil itself adjacent to the water. In other words, according to the uniform doctrine of the best authorities, the foundation of riparian rights, *ex vi termini,* is the ownership of the bank or shore. In such ownership they have their origin. They may and do exist though the fee in the bed of the river or lake be in the state. If the proprietor owns the bed of the stream or lake, this may possibly give him some additional right; but his riparian rights, strictly speaking, do not depend on that fact." *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214, 226, 227.

The above quoted portion of the opinion is quoted and approved in the case of *McCarthy v. Murphy,* 119 Wis. 159, 161, 162, 96 N. W. 531, wherein it is held that the riparian owner had the exclusive right to build piers and wharves in front of his land in aid of navigation, and might remove as a private nuisance a pier erected by any other person.

"It is settled in this state that the riparian owner on navigable water may construct in front of his land, in shoal water, proper wharves, piers, and booms in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water. This is properly a riparian right, resting on title to the bank, and not upon title to the soil under the water. It is a private right, however, resting, in the absence of prohibition, upon a passive or implied license by the public, is subordinate to the public use, and may be regulated by law." *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534, 547, 67 N. W. 918; *Cohn v. Wausau B. Co.* 47 Wis. 314, 322, 2 N. W. 546.

One riparian owner, without legislative authority, "has no legal right to draw the water from such lake, to the injury of other such riparian proprietors thereon." *Priewe v. Wis. State L. & I. Co., supra.*

The right of the private riparian owner is subject to the paramount right of the public to navigate navigable waters. *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185.

A riparian owner on Chequamegon Bay may build docks from his shore to the line of navigable water. *Northern P. L. Co. v. Bigelow,* 84 Wis. 157, 54 N. W. 496.

"Docks, wharves, and public landings are essential to navigation, and highly favored in the law. The defendant, as a riparian proprietor, may have had the right to construct this boom for his own benefit, if it had not interfered in such way with the free and unobstructed navigation of the waters of the lake. When it does so interfere with the private and public right of navigation, then it becomes a private and public nuisance to be abated, and those who place them or maintain them there are liable in damages for any special injury." *Union M. Co. v. Shores,* 66 Wis. 476, 479, 29 N. W. 243.

A riparian owner on the shores of a navigable inland lake whose property is valuable for pleasure resort purposes on account of its proximity to the lake and easy access to its waters for boating and fishing can maintain an action against other riparian owners for so drawing off the water of the lake as to lower its level. *Cedar Lake H. Co. v. Cedar Creek H. Co.* 79 Wis. 297, 48 N. W. 371.

Each owner of shore line on a navigable lake is entitled as against other owners to his proportion of the line bounding navigable water for contact with navigation, and to a direct course over intervening shallows to construct piers or other structures connecting the shore with such navigable line. *Thomas v. A., S. & I. R. L. R. Co.* 122 Wis. 519, 100 N. W. 993.

It would be illogical to hold that the riparian proprietor

could build a dock from his land to navigable waters but could not construct a ditch from the water to his land, where such construction would interfere with no public right.

The fact that one of the boundary lines of a highway is a navigable body of water does not affect the riparian right of the abutting proprietor who owns the soil in the highway, except in that the right of the public to the riparian privilege for public purposes incident to navigation and to navigable waters is paramount to the private riparian right. *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Bradley v. Pharr,* 45 La. Ann. 426, 12 South. 618, 19 L. R. A. 647.

It is well settled by the foregoing authorities, as well as by others, that the public and the abutting owners each own an estate in a highway, and that the estate of the abutter carries the fee and the exclusive right to use the same subject only to the public easement and what that easement carries with it. It is as well settled that the abutter cannot unreasonably interfere with the exercise of the public right. Whenever the abutter asserts a right and the public through its proper officers denies the existence of such right, we have a judicial controversy which is referable to the courts for decision. The public or its representatives can no more undertake to finally decide it than it could undertake to decide a dispute which might arise over the boundary line of a highway. It would be intolerable to permit one interested party to a controversy to make itself a court, judge, and jury to pass on its own case when its biased and partisan decision would operate to deprive the individual of a valuable property right. It seems to be absurd to claim that the town board could in this case proceed to hear, try, and determine its controversy with *Lawler* and forever conclude him by that determination. The rights of an abutter in a highway are just as sacred and just as much entitled to protection as is his right in the adjoining field or as is any other property right. The one can no more be taken without compensation than the other. Our law,

common and statute, which was in force when the easement was acquired determines the rights of the parties. It is not within the field of legislative competency to take from the abutting owner a single right or privilege which was secured to him by existing law, without adequate compensation. Town boards have the right to prevent encroachments and obstructions in highways. They cannot, however, adopt arbitrary definitions of these terms, and make encroachments or obstructions out of things which are not such in fact.

Mr. Lawler proposed to dig this ditch over his own land for his own purposes. Whether he had land to the west of the road is wholly immaterial, as I view the case. Whether he had the right to break the shore line in the construction of his ditch is also immaterial. If the shore line was left intact he might still construct and use his ditch, although it would not be as convenient for him as it would be to carry the ditch to the waters of the lake. The cases cited which recognize the right of an abutting owner to construct a ditch across a highway at grade enunciate no new principle. They correctly apply the general rule to specific cases of this nature. This general rule permits the abutting owner to use property which is his for any legitimate purpose which will not unreasonably interfere with the public use. That a ditch may be so constructed as not to work such interference is not only a matter of common knowledge, but the courts uniformly, as far as I know, so hold. The only question here is, Would the proposed ditch create such interference? and this is a question of fact which has been decided adversely to the appellants by the trial court on abundant evidence, and such finding has not been interfered with by this court.

Sec. 1346, Stats. 1898 (the so-called tunnel statute), confers no new right. It merely regulates the exercise of an existing one which the legislature can no more take away than it could take plaintiff's entire parcel of land without compensation. There is no doubt that the legislature has

the right to reasonably regulate the manner in which the abutting owner may exercise his rights in a highway. But regulation and confiscation are essentially different things. There can be no prohibition under the guise of regulation. The latter must be reasonably adapted to accomplish the end sought, and the regulative act itself must fall within the powers conferred on the body which seeks to regulate. *Kansas N. G. Co. v. Haskell,* 172 Fed. 545, affirmed *West v. Kansas N. G. Co.* 221 U. S. 229, 31 Sup. Ct. 564, and other cases heretofore cited. The power which the legislature of our state has conferred on town boards is one of regulation solely, and not one of confiscation or prohibition. The legislature carefully kept within constitutional lines when it enacted secs. 819, 1223, 1224, 1225, 1226, 1326, and 1330, Stats. Town boards cannot follow the maxim *Hoc volo, sic jubeo, sit pro ratione voluntas.*

While the trial court found as a fact that plaintiff owned land on both sides of the highway, there is nothing in the decision to suggest that it deemed such finding to be vital to the plaintiff's cause of action, or that the judgment would have been different had the circuit judge reached the conclusion arrived at by this court. The authorities cited demonstrate that an abutting owner on one side of a highway only, may construct lateral ditches on the portion of the highway which he owns and may also use the subsurface of the highway for any legitimate purpose although his ownership ceases at the center line of the highway.

I cannot see how the question of ownership on both sides of the highway is of any importance in the case, unless it is held that the so-called tunnel statute (sec. 1346) confers rights on the landowner which he did not have at common law. This is not my view of the statute. However, inasmuch as the court has held that the plaintiff was not entitled to judgment because he did not own on both sides of the road, and has decided by inference at least that he would be entitled to judgment if he did own on both sides, I feel it my

duty to discuss this question. I know that ordinarily there is little justification in writing a dissenting opinion on a pure question of fact. This is particularly true where the dispute is over the dry and uninteresting subject of surveys and boundary lines. The case, however, is one of a great deal of importance to the parties and has been argued and reargued in this court. Three of the judges who originally thought the judgment should be reversed expressed their views in an opinion by Mr. Justice TIMLIN. The court has expressed its views in the opinion on rehearing, and I feel that it is proper for those of us who do not agree with what is said in either opinion to state fully our reasons for the conclusions arrived at.

I cannot escape the conclusion that the action of the court in reversing the findings of fact made by the trial judge is unusual and even extraordinary. I think so because I believe that these findings are not against the clear preponderance of the evidence, but on the contrary are supported by such preponderance. I shall now proceed to give the reasons why I think so. The evidence bearing on the question whether Lake Geneva forms the western boundary of the highway where it passes through *Lawler's* land is of two kinds: surveys made in preparation for the trial of this case, and evidence aside from the surveys. I shall first consider the surveys.

In all, three surveys were made, one by an engineer, Mr. Teeple, assisted by another surveyor, Mr. Haskins, for the plaintiff; and two for the defendants, one by a Mr. Carlson and the other by a Mr. Powrie.

In reference to the qualification of Mr. Teeple, it may be said that he graduated from the mechanical engineering course at Cornell University in 1889, studied electrical engineering thereafter, taught electrical engineering in New Hampshire College for five years, then pursued engineering studies for two years at Harvard, and later did surveying for the Illinois Central Railroad for three seasons. His health

failing, he was obliged to quit the more active pursuits, and at the time of the trial he had been county surveyor of Walworth county for four years.

If it be assumed that he correctly located the point where the Norris survey crossed the north line of section 1, township number 1 north, of range 17 east, every surveyor who testified, including Professor Smith of the engineering department of the University of Wisconsin, testified that he pursued an absolutely correct method of relocating the line of the Norris survey. Briefly stated, Mr. Teeple's method was this: He ran a random line on what he assumed to be the correct variation of the needle between two established points on the line of the Norris survey, to wit, from a point four chains south of the west quarter corner of section 12 to a point 125 links east of the north quarter corner of section 1. He then measured the distance from this latter point to the point where his random line intersected the section line and corrected his random line by properly proportioning distances.

Mr. Norris made two records and two plats showing the location of his survey on October 24, 1839. Both were filed by the county clerk. One was offered in evidence as plaintiff's Exhibit 13 and the other as defendants' Exhibit 3. Exhibit 13 was recorded.

There were two differences between these exhibits. Exhibit 3 located one of Mr. Norris' stakes at a point which was marked by a bearing tree fifteen inches in diameter, located one and five-sixths degrees west of north from the stake and a distance of 1.51 links therefrom. In Exhibit 13 this distance is given as 151 links. This difference did not affect the result in this case, and it is only of importance in determining which plat is correct. I do not think there can be any question that Exhibit 13 correctly shows the above measurement. The idea that a surveyor who was plodding through the swamps, oak openings, and prairies of what is now Wal-

worth county, seventy-three years ago, locating his bearing trees within one one-hundredth of a link or one twelfth of an inch, is simply absurd.

The other difference between the records is material. Exhibit 3 shows a stake located on the Norris survey 1.25 links east of the quarter-section corner on the north line of section 1 aforesaid, being also the south line of section 36 in township number 2. Exhibit 13 shows this stake to be 125 links east of the quarter corner.

The Norris survey followed section lines from the southwest corner of section 26 to a point four chains south of the west quarter corner of section 12, a distance of two and a half miles, lacking four chains. There was no doubt as to the location of this quarter corner when the three surveys referred to were made. Mr. Teeple started his survey four chains south of this quarter corner, which was admittedly a correct point of commencement. He closed his survey 125 links east of the north quarter corner of section 1. Although both plats were in evidence, none of the surveyors made any contention that Mr. Teeple was not correct in so doing or that the survey should have been closed 1.25 links east of the corner. It has been argued on the appeal, however, that the learned surveyors and the still more learned counsel for the defendants did not discover that there was any difference between the two plats until the case was appealed to this court. However unwary counsel may have been, we cannot assume that their surveyors were not keenly observant of their employers' interests. They both had correct copies of Exhibits 3 and 13 long before they made their surveys, and it is not conceivable that they did not discover that there was a plain decimal point between the figures 1 and 25 in Exhibit 3. Neither is it conceivable that they did not regard the decimal point as an obvious error or as inserted to indicate that the measurement was 1 chain and 25 links. Much less can we presume that the court, which had both plats be-

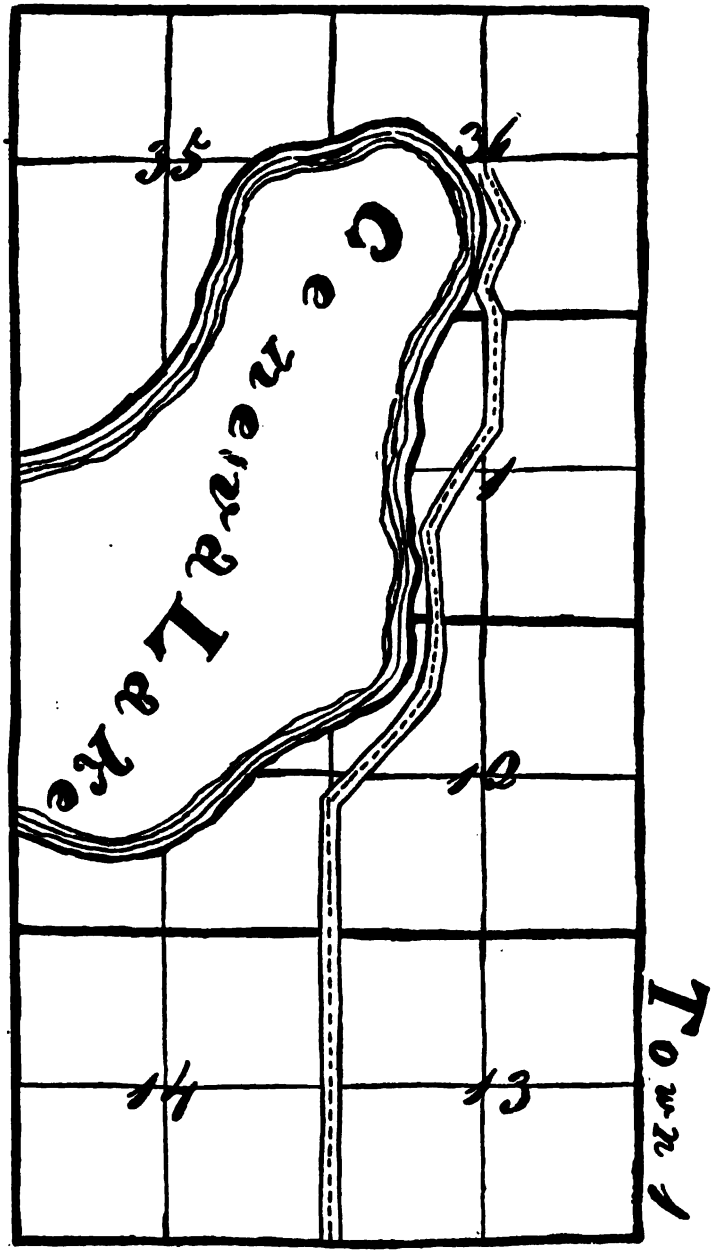
fore it, did not consider both of them and conclude that Exhibit 13 was correct, unless we throw overboard the rule that has been lately enforced with unrelenting vigor in certain classes of cases, that this court will not reverse judgments unless prejudicial error affirmatively appears. This court can indulge in no presumptions based solely on the statements of counsel, not conceded to be correct, that a trial court did not consider evidence legitimately before it.

For convenience a copy of that portion of Mr. Norris' plat showing the line of survey in dispute is herewith inserted.

Mr. Lawler owns a strip of land having a frontage of 400 feet on Lake Geneva. This strip comprehends the north 300 feet of section 12 and the south 100 feet of section 1 adjacent to the lake and extending east for some distance, and it is the location of the highway for a distance of 400 feet over this strip with which we are concerned. It is obvious that if Teeple's closing point is 125 links east of the north quarter corner of section 1 when it should be only 1.25 links, his survey swings too far to the east, and there is at least a narrower strip of land between the lake and the road where it passes over *Lawler's* land than the survey shows.

The questions for solution, then, are, Was Mr. Teeple justified in assuming that Exhibit 13 and the record thereof correctly showed the point where the Norris survey crossed the north line of section 1? and Did the court err in deciding that the Teeple survey was substantially correct?

In the first place, Exhibit 13 shows fourteen measurements in all. Six of these show full chains and no links. Eight show chains and links both, but in no instance is any fraction of a link shown. Exhibit 3 shows but two measurements containing fractions of a link. One of these has already been discussed, and the manifest absurdity of locating a bearing tree to within one one-hundredth of a link has been alluded to. It is manifest, to my mind, that as to this measurement Exhibit 13 is correct, and that in Exhibit 3 a


Geneva Lake
35
36
1
10
14
13
Town

dot was placed between the 1 and the 51 either inadvertently, or intentionally with the purpose of showing the measurement to be 1 chain and 51 links. I think it is almost as absurd to conclude that Mr. Norris deviated one and one-quarter links, or less than ten inches, from the quarter line when he reached the north quarter corner of section 1. Before reaching section 1 he ran approximately three miles on section lines, and in going all of this distance he ran the center line of the road on the section line. When he came within four chains of the west quarter corner of section 12 he was obliged to deviate to the east because of the lake and of the contour of the country, so that when he reached the north and south quarter line running through section 1, we find that he crossed the same and located the west line of the road a trifle east of this quarter line. It requires a lot of faith to believe that Norris, because of the topography of the country, found it necessary to deviate ten inches from the quarter line in locating the center line of the road.

But there is an item of evidence which more conclusively demonstrates that Norris did not carry the center line of the road across the north line of section 1 only ten inches east of the quarter-post. This survey was made shortly after the government survey, when the government monuments were plain and readily found, and there can be no doubt that Norris found the quarter-post as he says he did. He made a plat of his road which was four rods wide, and its west boundary line is shown on this plat to be slightly east of the quarter corner, as will be seen by reference to the *facsimile* above inserted. While Mr. Norris might make a slight error in drawing his lines on this plat, it is well nigh inconceivable that he would throw the entire roadway east of the quarter corner, if his center line in fact ran within ten inches of it. He would in practice run the center line of the road through the corner if the correct measurement had been 1.25 links, because his plat was drawn on a scale of two inches to the

mile, and a variation of ten inches on such a plat would be expressed by a deviation of about one three-thousandth of an inch. I know it has been said that if the correct distance of the stake set by Norris from the quarter corner was 125 links the plat does not throw the road far enough east. But on a plat drawn on so small a scale, the deviation of the west line of the road from the quarter corner, in order to locate the Norris stake where Teeple located it, would be so small as to be imperceptible. What we have definitely is the obvious fact that the quarter-post is entirely outside of the highway when it should be practically at its center line if Exhibit 3 is correct.

There is another obvious reason why the figures on Exhibit 13 are correct—a reason which the only surveyor for defendants who made a survey that could properly be called such, seeks to explain by saying in effect that Norris made a mistake in his survey. It will be noticed by a reference to the plat that the survey terminates nearly one half a mile north of the north line of section 1. The length of this piece of road as surveyed is 36 chains and 79 links. The course of the survey through section 36, commencing at its south line. is as follows: North 21 degrees 10 minutes W., 6 chains and 79 links; from thence north 14 degrees and 12 minutes east, 21 chains; from thence north 27 degrees 55 minutes west, 9 chains to the north terminal point. Running this line on the courses and distances given and starting at a point 1.25 links east of the north quarter-post of section 1 would not only run it through the middle of a steep embankment twenty feet in height, but would run it into the lake at a point about 1,500 feet from said quarter-post. I have been unable to find any evidence in the record which contradicts this. Following the Norris survey from a point 125 links east of the south quarter corner of section 36 would bring the center line of the road about fifty feet east of the top of this embankment.

Another circumstance tending to show that Exhibit 13 shows the correct survey is the fact that it was the one recorded in the surveyor's office. It is true that this record was not offered in evidence, but Mr. Teeple testified, without objection, to the fact.

Counsel very complacently assume that Exhibit 3 is correct and that therefore Exhibit 13 is incorrect, without a substantial fact to support such an assumption.

A good deal of attention has been devoted to the true location of the point where the Norris survey crossed the north line of section 1, because if Teeple did not determine the correct point of crossing, the accuracy of his survey would be materially impeached. To describe in detail the three surveys and point out the weaknesses in each would consume considerable space.

The Carlson survey may be disposed of summarily. It was evidently made with one object in view, and that was to throw the road over so close to the lake that the latter would form the boundary line of the highway where it passed through *Lawler's* land. The appellants neither justify nor claim anything under this survey, so nothing more will be said about it.

The appellants, however, do insist that the survey made by Mr. Powrie was made on correct principles, and that it is entitled to great if not controlling weight. Mr. Powrie made his survey on the theory that Norris in making his survey used the polaris or true meridian in running his lines. If Powrie was not correct in making this assumption, then his survey fails, and there is not a particle of evidence in the record to show that Norris used such meridian. It is just as logical to assume that Norris ran his line in accordance with the variation of the compass. All things considered, the latter is the more logical assumption of the two. In any event, the entire Powrie survey is based on a hypothesis that may be correct or may be incorrect. That the hypothesis is not a correct one must be accepted as a fact, unless it be assumed that

Norris did not correctly run his lines. Powrie, by assuming that Norris ran his lines on a true meridian and by following the courses and distances which he gave, found that the survey would cross the north line of section one, 151 links west of the quarter-post, whereas Norris stated in Exhibit 13 that his line crosses 125 links east, and, if it be assumed that Exhibit 3 is correct, the line still crossed east of the quarter-post. Powrie does not explain this discrepancy by actually claiming that the line in fact passed to the west of the quarter-post, because this would run the continuation of the road clear into the lake. What he does claim is that where Norris described his last course before reaching the quarter-post on the north side of section 1 as being 28 chains and 50 links north of the stake set on the section line, he really meant that he ran about three degrees west of north.

So, while some doubt and discredit may be thrown on the Teeple survey, when we come to the surveys made by the appellants we find one of them absolutely worthless and the other based on what is in all probability an entirely wrong hypothesis.

Counsel criticise the Teeple survey because of the fact that it is outside the line of the traveled track for a considerable distance. This is true, and it is also true that the Powrie line is outside of the traveled track a much greater distance.

An attack is also made on the Teeple survey because in carrying it onto the map which he made an error of ten feet was made at one point. The error is immaterial as to any question involved in the case, and in so far as it would affect the credibility of the witness it is more than offset by the fact that Mr. Powrie made three mistakes in carrying the survey of the road as made by him onto his map. Mr. Teeple was the only surveyor who made any attempt to find the monuments which marked the survey made by Norris. These monuments were old and decayed and it is always possible that a mistake in reference thereto might be made. Teeple and his asso-

ciates, however, were certain that they found the remnants of a number of these monuments, and there is nothing inherently improbable about the testimony. It was for the circuit court to pass upon its credibility and it has done so. There is no real dispute between Powrie and Teeple as to the correct location of the north quarter corner of section 1. Powrie simply says that he could not locate this corner. It can hardly be said in reference to this that there was even a dispute between the testimony of the two witnesses, and the circuit judge had little choice except to find in favor of the contention of the respondent on the question. The difference between them on this point, if it can be said that there is any, is not great enough to make any material change in the Teeple survey, in any event. Mr. Teeple did at one point change his line seven feet because of an original monument which he conceived he had found, and considerable fault is found with his having done this. But if the change was not made on sufficient evidence, it was wholly immaterial, because, if it had not been, the Teeple survey would still show a strip of land substantially twenty feet in width between the highway and the lake. In so far as the surveys were concerned, the circuit judge was confronted with this situation: He had a survey by Carlson admittedly worthless. He had one by Powrie which might have been made on a correct hypothesis, but in all probability was made on a wrong one; and he had a survey by Teeple, which, it may be admitted, was subject to some criticism, in that there was a bare possibility that Exhibit 3 correctly showed the point where the Norris survey crossed the north line of section 1, and there was also a possibility that Teeple did not get the correct location of the north quarter corner of this section.

Now, then, was there anything in reference to the Norris line that the court had before it which would satisfactorily and even conclusively show which of the contentions was right? I think there was. It must be remembered that

Norris made his map at substantially the same time that he made his survey; that he made it when he was familiar with existing conditions, and that we have it before us. A reference to the portion of it which pertains to the line of road through *Lawler's* land already appears. There is no difference between Exhibits 3 and 13 in this respect. In fact the plat shown herein is a blueprint taken from Exhibit 3. This has been used for convenience because no blueprints were taken of the other plat. Now, this plat shows a well defined strip of land between the lake shore and the highway on both sides of the section line which forms a boundary between sections 1 and 12. In fact it shows that the highway at no point along the lake extended to the shore line.

In view of the evidence furnished by this plat and in view of the character of the testimony pertaining to the surveys, I am wholly at a loss to see how a court could or can possibly reach the conclusion that Mr. Norris adopted as the west boundary line of the highway at the place in dispute the ordinary high-water mark of Lake Geneva. The Powrie and Carlson surveys throw the west line of the road actually into the lake. I do not of course contend that the plat would be better evidence than the survey itself. What I do contend is that where a competent surveyor has made a survey which corroborates the plat, the latter cannot be impeached by simply showing that another survey was made, when that other survey is based on an assumption which there is neither proof nor presumption to support.

No presumption can be resorted to in this case to the effect that the traveled track follows the center line of the road. We know from practical observation that this is not generally true of ancient highways, particularly where they were carried around obstructions. We know as a matter of fact that it is not true in this case if any attention whatever is to be paid to the Norris survey. That survey consists of a series of straight lines forming angles at the connecting points.

The survey from a point four chains south of the west quarter-post of section 12 to a point north of the *Lawler* land runs as follows: North 39½ degrees east 31 chains and 41 links; thence north 24 degrees 15 minutes east 7 chains and 44 links; thence north 9 degrees 45 minutes east 12 chains and 65 links; thence north 4 degrees west 14 chains and 37 links. We would naturally expect a curvature in the traveled part of the roadway at the angles, but all of the surveys show deviations from a straight line where there are no angles. All three of the surveys demonstrate conclusively that the roadway as built did not follow the center line of the highway as surveyed by Norris. In none of the surveys made does the alleged relocation of the Norris line coincide with the traveled track any considerable distance. Either Norris did not run straight lines as he says he did or else the traveled track was not built on the center line of the road. Such part of the right of way was used as was found to be best adapted for grading purposes. The expense of building roads when this one was constructed was considered of more importance than that there should be an air line for ox teams into the village of Lake Geneva.

Defendants' Exhibit 5, being a plat showing the Carlson survey, in the practical accuracy of which Powrie concurs, shows that the center line of the highway as it is claimed Norris surveyed it is in the lake from one to six feet at high water for a distance of 160 feet through the *Lawler* land. It shows that such center line for a considerable distance is but from five to eight feet from the low-water line. This would throw the north line of the road from thirty-five to forty feet into the lake at high stage and from twenty-five to twenty-eight feet at low stage. It requires an abiding faith in the infallibility of the defendants' surveyors to believe that Norris located his road in any such way, particularly when he solemnly declared in the plat which he made that he did nothing of the kind.

Of course there is a highway along this lake by user. But this does not mean that there is any highway by user two rods on either side of the center of the traveled track. It means that the public has the right to use the traveled track and enough land on either side to permit the convenient passage of teams and vehicles. *Bartlett v. Beardmore,* 77 Wis. 356, 46 N. W. 494; *Konkel v. Pella,* 122 Wis. 143, 99 N. W. 453; and *Neale v. State,* 138 Wis. 484, 120 N. W. 345. The defendants' surveys show that the center of the traveled track is from twenty to twenty-five feet from the high-water line of the lake. How much farther it is from the ordinary high-water mark which in reality forms the boundary line of the riparian owner does not appear. The traveled track is wholly within the limits of the survey of the road made by Mr. Teeple.

The court does not hold that the trial judge might not have very properly found that the Teeple survey was correct, if the case was to be decided on the surveys. It does hold that the dispute in the testimony between the surveyors raises a question of doubt as to which survey is correct, and in effect proceeds to disregard all of them and decides the case in defendants' favor on other evidence offered. This evidence principally consisted of testimony tending to show the location of the fence on the east side of the highway where it crossed the plaintiff's land, and also the location of a bridge over a creek on the line of the highway.

If the evidence of the surveyors creates a situation of uncertainty, that situation is not relieved by the testimony tending to show the location of the fence and the bridge. In the first place, it is fairly established by the testimony that the fence in question was not erected until more than twenty years had elapsed after the survey was made and the road was opened. Most of the witnesses who testified were familiar with the situation so far as fences were involved for a period of twenty-five years or less. One witness had an in-

distinct recollection that the original fence was erected as early as 1850. But Mr. Gavin, a witness for the defense, testified that he distinctly remembered when there was no fence along the east side of this portion of the highway. He was not born until 1856, seventeen years after the highway was opened up. By this time the traveled track had been well established, and no doubt the original monuments set by Norris had been largely obliterated; so there would be nothing very remarkable about placing a fence closer to the traveled track than it should have been placed had the survey been followed. There is another fact in reference to this survey that is still more significant. The witnesses all agree that the original fence was a rail fence which was later replaced by a wire fence. Mr. Button, the man who occupied the premises now owned by *Lawler,* testified that when the old rail fence had become useless and the new fence was built, it was not built on the line of the old fence but was built eight feet nearer to the traveled track. If this testimony is true, and really there is but very little to contradict it, it would show that *Lawler* had some land between the highway and the lake, if it be assumed that the rail fence was originally constructed on the correct boundary line. So I think the ancient fence did not help the defendants' case.

It is also said that Mr. Norris set a stake where his line crossed the creek, and that the presumption would be strong that the bridge was built where the stake was set and that it really marked the center of the highway. This might be so if we assume that highway builders in that day were following air-line routes and that they preferred to have the highway built along the middle of the right of way rather than to take advantage of the topography of the country and build bridges in places within the right of way where they could be most conveniently constructed. The road builders were not obliged to follow the center line of the right of way, but could deviate therefrom if it was

thought advantageous to do so. That such was the common practice is a matter of common knowledge.

There are some other minor considerations urged in support of the decision of the court on the facts which I do not think I would be justified in discussing. I do not feel that the surveys should be so cavalierly set aside. Mr. Norris was evidently a competent surveyor. He describes accurately and concisely the line of his survey. The highway as constructed does not extend beyond the exterior boundary lines of the highway surveyed by Norris. He gives his courses and distances and there is no doubt about the location of the starting point and there is no great reason why his line could not be re-established. The probabilities are altogether in favor of the Teeple survey or the Powrie survey being correct. If either is correct, then the road does not follow the center line of the highway. In fact, if any reliance whatever can be placed on the Norris survey, the center line of the road did not follow that survey, but there was some deviation from side to side for convenience in building the highway, such deviation, however, not extending beyond the right of way.

As stated before, I think the trial court was correct in adopting the Teeple survey, and in any event this court should not say that the finding of the trial court is not sustained by the evidence.

MARSHALL, J. I concur in the foregoing opinion by Mr. Justice BARNES.

HARDY, Plaintiff in error, vs. THE STATE, Defendant in error.

April 27—June 4, 1912.

Rape: Identity of offender: Evidence: Sufficiency: Competency: Statements in presence of defendant: Instructions to jury: Arguments of counsel.

1. In a prosecution for the rape of a girl eight years old, her testimony, corroborated by that of two children with whom she had been playing and by other evidence, together with proof of a former conviction of defendant for a similar offense, and his conflicting and contradictory testimony in an attempt to establish an *alibi*, *held* sufficient to establish the fact that he was the person who committed the crime.
2. Upon a criminal trial, evidence that the accused, when charged with the offense, or when declarations touching his guilt were made in his presence and hearing, remained silent when it would have been proper for him to speak, is competent.
3. There was no error in such a case in charging the jury to the effect that testimony as to declarations made in the presence of defendant is only to be considered on the question of identity and for no other purpose, and that statements made in his presence and not denied, disavowed, or explained by him when he had an opportunity to do so may be considered by the jury; nor in refusing to give a requested instruction that testimony "as to what was stated in the presence of the defendant and any officers accompanying him concerning the identity of the person who committed the crime charged . . . must be received and considered by you only concerning its effect upon the demeanor of the defendant at the time he was confronted with such identification."
4. It was not prejudicial error, in such case, to permit counsel for the state to discuss to the jury a case previously tried in the same court, the jury being instructed that such discussion had no bearing on the question of the guilt or innocence of the defendant, but that it was not improper to use it by way of explanation and illustration, and that it could only be so considered by them.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BRAZEE, Judge. *Affirmed.*

Lyman G. Wheeler, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, *Winfred C. Zabel,* district attorney, and *Andrew Gilbertson,* assistant district attorney, and oral argument by *Mr. Jackson* and *Mr. Gilbertson.*

KERWIN, J. The plaintiff in error, hereinafter called defendant, was convicted of the crime of rape upon Gertrude Boerner, a girl between seven and eight years of age, and sentenced to imprisonment in the state prison at Waupun for the term of twenty-five years. The defendant brings the case here and asks reversal on the ground of alleged error.

1. It is first contended that the evidence is not sufficient to support the conviction. It is not disputed that the crime was committed, but it is argued that the evidence is not sufficient to establish that defendant is the person who committed it, therefore the court erred in denying a new trial and in refusing to discharge the defendant. As said by counsel for defendant, "The whole issue in this case is whether *George Hardy* committed the crime, or some other person unknown."

Under this head counsel for defendant argues that the great weight and preponderance of the evidence in the case is with the defendant and not with the state; that the evidence relating to identity of the person who committed the crime is vague and uncertain and rests upon the evidence of three little children; that the identity of defendant as the person who committed the crime was not established; and that the evidence on the part of defendant established an *alibi.*

The crime was committed between 8 and 8:30 o'clock in the evening of May 17, 1909, in a shed or barn a short distance from the place where the said Gertrude Boerner, hereinafter called Gertrude, was playing with other children

shortly before the offense was committed. She testified that she was playing on the steps of the Mischke residence, next door to her parents' residence, on the evening in question, in company with Hilda Mischke, Wallie Mischke, and her brothers Rollie and Gilbert; that defendant took her back of the Mischke and Boerner residences, through an alley, to a blacksmith shop; that he pulled her along and choked her when at or near the blacksmith shop, and then took her into a barn across from the blacksmith shop; that there were shavings in the barn upon which he threw her and committed the crime. She identified the defendant as the person who committed the offense and gave quite an accurate description of the clothes which he wore; that after defendant had committed the offense he left her in the barn and went away and shortly afterwards she went home and an examination disclosed that the offense had been committed; that defendant told her before he left that she must not tell any one about it; that he lived across the street from the Boerner residence, and that she saw him twice before the offense was committed. True, she made many contradictory statements in her evidence, which are urged against its credibility, but in view of her age, inexperience, and unfamiliarity with court proceedings this is not surprising. In fact, her testimony upon the salient points in the case is quite convincing, and its credibility was clearly for the jury. Moreover, the testimony of Gertrude respecting the defendant taking her through the alley towards the barn and his presence where the children were playing just before taking her is strongly corroborated by the Mischke children, Wallie and Hilda. They both identified defendant as the person who took Gertrude through the alley toward the barn and told the other children to go back, and after they had gone back proceeded with Gertrude toward the barn where the offense was committed.

The defendant denies commission of the crime or that he

took Gertrude to the barn, and attempts to prove that he was elsewhere between 8 and 8:30 on the evening in question. His testimony, however, is conflicting and contradictory and is out of harmony with the evidence of other witnesses as to his whereabouts on the evening in question. The credibility of his evidence was for the jury. It would serve no useful purpose to detail the evidence of the witnesses on this subject. There is also other evidence than that of Gertrude and Hilda and Wallie Mischke corroborating the state's case, besides proof of conviction of plaintiff on a former occasion for assault on a girl seventeen or eighteen years of age. It is sufficient to say that after a careful examination of the record we are convinced that the evidence is ample to support the verdict.

2. Error is assigned upon the admission of evidence of Mrs. Boerner as to what her little boys said respecting identity of defendant when defendant was brought into their presence. The twin Boerner children, Roland and Gilbert, about six years old, were produced in court. Roland was examined by the court with regard to his qualifications to testify, and the court reserved its rulings on qualifications and allowed the boy to stand aside and he was not called again. Gilbert was also examined as to qualifications and ruling reserved. He also was told to stand aside. So neither of the Boerner twins testified upon the trial below. The mother, however, was permitted to testify concerning the officers bringing the defendant before these children on May 18th after commission of the crime. She testified, under objection, that the defendant was brought into the store in presence of one of the twins and that she heard the boy say "That is he." Motion to strike out this statement was denied, and such denial and the admission of the evidence are complained of as prejudicial error. Gertrude's father also testified, under objection, that one of the twins, in answer to a policeman, stated in the presence of defendant that defendant was

the one who showed him the little cats. There is evidence that before defendant took Gertrude back through the alley he said to the children that he wanted to show them some little cats.

Complaint is made by counsel for defendant that no opportunity was offered to cross-examine the twins when they were examined as to qualifications by the court. But none was asked by counsel when they were on the stand, nor was any request made to recall them for cross-examination. The chief objection, however, under this head is that it was error prejudicial to defendant to permit the statements of what the twins said in his presence respecting identity to be put in evidence; that the evidence was hearsay and incompetent. The evidence tends to show that defendant made no denial when he was confronted by the twins and other children and identified as being the person who led Gertrude away. The defendant when on the stand was asked what he said when the children identified him and his reply was that he said nothing. There is also evidence of other witnesses that when defendant was in the presence of the children who accused him he said nothing, but looked down. The evidence as to how defendant acted when accused by the children would justify the jury in believing that such acts indicated a consciousness of guilt. The statements of the children referred to were made before defendant had been arrested. An investigation of the matter was being made and defendant knew it when the charges of his identity by the children were made. He was under no restraint, and no cogent reason appears why he should not have denied the charges when made, and the fact that he did not do so was proper for the consideration of the jury. We think the evidence was admissible. Upon a criminal trial, evidence that the accused, when charged with the offense, or when declarations touching his guilt were made in his presence and hearing, remained silent when it would have been proper for him to have spoken,

is competent. And it has been held that it is no objection to the admission of the evidence that the accused was, at the time, under arrest. *Kelley v. People,* 55 N. Y. 565; *People v. Wennerholm,* 166 N. Y. 567, 60 N. E. 259; 2 Wigmore, Ev. § 1072; *Donnelly v. State,* 26 N. J. Law, 463; Burrill, Circumstantial Ev. sec. XXIV, pp. 482, 483; *Hochrieter v. People,* 2 N. Y. Ct. of App. Dec. 363; *Rex v. Bartlett,* 7 C. & P. 832; *Johnson v. State,* 17 Ala. 618; *People v. McCrea,* 32 Cal. 98; *Rex v. Smithies,* 5 C. & P. 332; *Spencer v. State,* 20 Ala. 24.

3. The following part of the charge is complained of:

"The testimony of any witness in this case as to the declarations of any witness made in the presence of the defendant is only to be considered on the question of identity and for no other purpose. Statements made in the presence of the defendant and not denied, disavowed, or explained by him may be considered by the jury, and if the defendant had an opportunity to deny, disavow, or explain such statement at the time."

Each sentence is separately excepted to.

The question of identity, whether the defendant was the person who led Gertrude through the alley, was the controlling question in the case, and of course within the knowledge of defendant. Under the authorities heretofore cited, declarations made in the presence and hearing of the defendant charging him and not denied by him were admissible against him. The court did not tell the jury that the statements of the children amounted to evidence of guilt, or evidence that defendant was the person who took Gertrude through the alley, but only that such evidence might be considered on the question of identity when made in the presence of the defendant and not denied, disavowed, or explained by him when he had an opportunity to do so. The instruction as far as it went was proper. If more specific instruction were required it should have been requested. But counsel for defendant com-

plains because the court refused to give the following instruction:

"You are instructed that the testimony of any witness upon the trial of this action, as to what was stated in the presence of the defendant and any officers accompanying him concerning the identity of the person who committed the crime charged in the complaint, must be received and considered by you only concerning its effect upon the demeanor of the defendant at the time he was confronted with such identification."

We think there was no error in refusing to give this instruction. The instruction would not have further enlightened the jury. They were charged that statements made in the presence of the accused under certain circumstances relating to demeanor might be considered by them on the question of identity. The instruction requested, if given, would be more likely to mislead than to enlighten the jury. By it no guide was given to the jury by which they could properly weigh the demeanor of the defendant. They were not told what effect should be given silence, acts, or declarations of defendant when confronted with the charges. 2 Wigmore, Ev. § 1072.

4. Error is assigned because the court permitted counsel for the state to discuss to the jury a case which had been tried in the municipal court of Milwaukee county some time prior to the trial of the instant case. On this matter the court below instructed the jury that the discussion had no bearing on the question of the guilt or innocence of the defendant, but that it was not improper to use it on the question of explanation and by way of illustration, and that it could only be so considered by them. We find no prejudicial error under this head.

After a careful examination of the record we are of the opinion that the defendant had a fair trial, and that no prejudicial error was committed.

By the Court.—The judgment of the court below is affirmed.

WOOLEY and another, Respondents, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 14—June 4, 1912.

Railroads: Demurrage charges: Recovery back: Rules: Place of delivery of cars: Duress: Voluntary payment: Evidence: Verdict: Omitted matters: Presumption on appeal.

1. Under a rule of a railway company providing that when delivery of freight on a designated carload delivery track or private siding could not be made on account of such track being fully occupied, or for any other reason beyond its control, delivery should be made at the nearest available point, demurrage could not be charged until the free time for unloading had elapsed after the car was placed at the nearest available point where it could be unloaded and, perhaps, notice given to the consignee.
2. A rule that "cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees," does not apply to the case of cars which by contract are to be unloaded on a designated carload delivery track, and which for some reason cannot be delivered there, but applies to cases where the carrier is ready to make delivery and the consignor or consignee neglects or refuses to designate the place where delivery is desired.
3. Proof that consignees of paving materials, on being offered the use of any available tracks for the purpose of unloading, replied that they "wanted the cars placed as soon as possible to work so that they could unload and avoid teaming expense," does not show refusal on their part to accept delivery on any track except one previously designated.
4. The fact that plaintiffs were in urgent need of money due them on a paving contract from a railway company, and that the latter refused to pay a sum of over $6,000, so due, until a disputed bill of $434 for demurrage was settled, would not be sufficient to establish duress in the payment of such demurrage charge.
5. Where, however, the evidence was such that the jury might have found that such payment was made upon the understanding that the matter would be subject to investigation and to readjustment in case of error, the supreme court will not reverse a judgment in favor of the contractor because of an

erroneous finding of duress by the jury, but will, in support of the judgment, presume a finding by the court in accordance with such evidence.

[6. Whether or not, since the enactment of ch. 362, Laws of 1905, voluntary payment is a defense to a claim to recover a wrongful or excess charge exacted for demurrage, not decided.]

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The plaintiffs are copartners in the city of La Crosse, doing business under the name of Wooley & Hanson. On or about May 30, 1906, plaintiffs and defendant entered into a contract whereby in consideration of the sum of $6,605.02 plaintiffs agreed to furnish the material and to do certain paving work on and around the station grounds of defendant in the city of Madison. The contract provided that the railway company was to furnish free transportation over its line for materials entering into the work. In September, 1906, the work was completed in accordance with the contract, and the defendant through its agent at La Crosse tendered its check for the above amount to plaintiffs, with the condition that they sign a receipt in full and also pay the sum of $434 claimed by the defendant to be due as demurrage on account of plaintiffs' failure to promptly unload cars. The amount due on the contract was paid to plaintiffs and they in turn paid the $434 demurrage. Thereafter plaintiffs brought this action to recover the sum paid for demurrage, alleging that this amount was paid under duress owing to plaintiffs' financial condition and need of money, and with the understanding and agreement between the parties that the payment was made under protest and with a view to readjustment and refund if the charges were found to be incorrect. The complaint also alleged that any delay in unloading material on account of which demurrage was claimed was due to defendant's failure to furnish sufficient track space for the placing of cars for unloading. The answer was a general

denial of the allegations of the complaint. The jury returned the following special verdict:

"(1) Was there any sum due to the defendant from the plaintiffs for demurrage on cars on the 21st of September, 1906? *A.* No.

"(2) If you answer the foregoing question 'Yes,' then what was the sum then due? *A.* $——.

"(3) Did the defendant on the 21st of September, 1906, refuse to pay to the plaintiffs the amount due to them upon their contract for work done at Madison except upon condition of the payment by the plaintiffs of the sum of $434 claimed to be due for demurrage on cars? *A.* Yes.

"(4) If you answer question No. 3 'Yes,' then did such refusal on the part of the defendant so affect the plaintiff *Wooley's* mental condition as to render him incompetent to contract with the exercise of his free will power? *A.* Yes."

On such verdict judgment was entered for plaintiffs. Defendant appeals.

For the appellant there was a brief by *William G. Wheeler,* attorney, and *Edward M. Smart,* of counsel, and oral argument by *Mr. Smart.*

Frank Winter, for the respondents.

BARNES, J. Appellant assigns as error (1) refusal of the court to set aside the first finding of the jury and grant a new trial; (2) the instruction given to the jury under question 1 of the special verdict; (3) refusal of the court to grant judgment for the defendant on the ground that a voluntary payment of the demurrage charges had been made; (4) in instructing the jury as to what would constitute duress.

The rules governing demurrage charges were offered in evidence. But two of them would seem to have any application to the case. These are secs. 1 and 2 of rule 5. Sec. 1 provides that "cars containing freight to be delivered on carload delivery tracks or private sidings, shall be placed on the track designated as soon as the ordinary routine of yard work

will permit. When delivery cannot be made on account of such track being fully occupied or for any other reason beyond control of the carrier, delivery shall be made at the nearest available point."

The material part of sec. 2 reads: "Cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees. . . ."

These two rules would seem to cover different situations. Sec. 1 appears to be applicable here. The cars were to be delivered on a carload delivery track and such track was designated by plaintiffs. If delivery could not be made on this track for any reason, then the railroad company had the right to make delivery at the nearest available point. When it became apparent that cars could not be taken care of on the designated track, we think it was the duty of the defendant to make delivery at the nearest available point where the cars could be unloaded, and perhaps to advise the plaintiffs when the cars were so placed. There was no need of any further direction from the plaintiffs. The rule specified what should be done in case delivery could not be made promptly at the place selected. Sec. 2 would appear to apply to a case where the carrier was ready to make delivery and the consignee neglected or refused to designate the place where delivery was desired. In such a contingency the free time would begin to run from the time the carrier was ready to make delivery. We cannot find in the evidence any showing that any of the cars were in fact delivered to the nearest available point, or that any attempt was made to spot them at a place where they could be unloaded, except on the designated tracks, with one or two exceptions. As to these last exceptions, cars were unloaded at the place where they were spotted, and apparently within the required period.

The evidence shows that plaintiffs so ordered their material that it came in a rush and in such a manner that they were unable to take care of it and find a place to store it until

it was needed for use, and there is likewise considerable evidence tending to show that there was delay in unloading, occasioned by the fact that plaintiffs could not take care of the contents of the cars. This in itself does not establish the right of the defendant to collect demurrage, unless it is also shown that the plaintiffs failed to unload the cars consigned to them within the required time.

It is also contended by the defendant that plaintiffs refused to accept delivery of the cars at any point except on the designated tracks referred to, and that consequently defendant was not called upon to spot the cars at any other place, and was entitled to compute the time from which free time began to run from the hour it was ready and willing to spot the cars. If the fact was as claimed, it would be difficult to find any flaw in the conclusion reached. If plaintiffs refused to accept any delivery except on the designated track or tracks, it would be an idle ceremony for the defendant to make delivery elsewhere, and it would be excused from so doing. But the evidence of such a refusal is weak. It is to the effect that plaintiffs were offered the use of any available tracks for the purpose of unloading, and that "they replied that they wanted the cars placed as soon as possible to work so that they could unload and avoid teaming expense." This language can just as well be construed as expressing a wish as a refusal. It does not appear to whom this statement was made. Furthermore, the plaintiffs' foreman, Stevens, who had charge of the unloading of cars for them, testified as follows: "*Q.* Did they offer any cars on any other track except the track you speak of [track B] for unloading? *A.* No, sir." Inferentially, the plaintiff *Wooley* testified to the same effect.

While the evidence is far from satisfactory, we think it is sufficient to warrant the jury in finding that all of the cars except five were unloaded within forty-eight hours after they were spotted; that as to those five the plaintiffs were justified

in not unloading them because of the contemplated change in plans, which if made would do away with the use of the material therein; that such change was made; that the plaintiffs requested delivery on a designated track; that defendant did not make delivery at the nearest available point of such cars as could not be delivered promptly on such designated track, and that plaintiffs did not refuse to accept delivery at other points than on the designated track. These facts being established, under the construction which we place upon the demurrage rules the plaintiffs were not chargeable with demurrage.

The second error argued relates to an instruction given to the jury in reference to the first question. The court in its instruction simply placed the construction on the rules which we find to be correct, and therefore committed no error.

The appellant contends that the plaintiffs made a voluntary payment of the amount claimed for demurrage and hence there can be no recovery. The jury found that the payment was made under duress and therefore was not voluntary.

"Duress, in its broad sense, now includes all instances where a condition of mind of a person, caused by fear of personal injury or loss of limb, or injury to such person's property, wife, child, or husband, is produced by the wrongful conduct of another, rendering such person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion. . . . The question in each case is, Was the alleged injured person, by being put in fear by the other party to the transaction for the purpose of obtaining advantage over him, deprived of the free exercise of his will power, and was such advantage thereby obtained? If the proposition be determined in the affirmative, no matter what the nature of the threatened injury to such person, or his property, or the person or liberty of his wife or child, the advantage thereby obtained cannot be retained. The idea is that what constitutes duress is wholly a matter of law, and is simply the deprivation by one

person of the will power of another by putting such other in fear for the purpose of obtaining, by that means, some valuable advantage of him. The means by which that condition of mind is produced are matters of fact, and whether such condition was in fact produced is usually wholly matter of fact, though of course the means may be so oppressive as to render the result an inference of law." *Price v. Bank of Poynette,* 144 Wis. 190, 198, 128 N. W. 895.

We should have difficulty in reaching a conclusion that the evidence in this case shows a payment under duress, notwithstanding the fact that it is usually a question for the jury to determine the state of mind of the party who claims to have acted under duress. About the only fact shown to establish duress was that plaintiffs were in urgent need of the money due them on the contract, which the defendant refused to pay until its bill of demurrage was settled. This fact would seem to be entirely inadequate to produce such a state of mind as the law contemplates must exist in order to constitute duress. However, we do not think that it was essential to the case of the plaintiffs to show in this instance that the payment was in fact made under duress. The evidence of the agent of the defendant at La Crosse tends to show that he advised the plaintiffs to pay the demurrage so that they could get their money on the contract, and that if no demurrage was legally chargeable they could put in their claim in the usual way and that so much of it as was improperly exacted would be refunded. The agent says this conversation took place before the draft was delivered. This matter of exacting demurrage was a subject of discussion between Mr. Carter, the chief engineer of the defendant, and the plaintiffs, the latter claiming that no demurrage should be charged to them and that the amount due on the contract, aggregating over $6,000, should not be held back because of this alleged claim for demurrage. Mr. Carter, in writing to the plaintiffs under date of September 3d, suggested that they

accept payment of the agent for the amount of the voucher less the demurrage charges, pending an investigation, and clearly carries the idea that if on investigation it was found that the whole or any part of the demurrage bill was improperly exacted a refund would be made. We think under this evidence the jury might well have found that the defendant waived the right to insist that the payment of the demurrage charges was voluntary, and that it was made with the understanding that the correctness of these charges would be inquired into and that if the charges were erroneous in whole or in part a refund would be made. The jury made no finding on this question and none was requested. But in support of the judgment we must presume a finding by the court, the evidence being ample to sustain it.

It may well be doubted whether voluntary payment is a defense since the enactment of ch. 362, Laws of 1905, where an excess charge is exacted for demurrage, but it is unnecessary to pass upon this question and we do not do so.

By the Court.—Judgment affirmed.

STATE EX REL. MCMANMAN and others, Appellants, vs. THOMAS and others, Respondents.

May 14—June 4, 1912.

Statutes: Construction: Conflicts: Title: Villages: Election of trustees.

1. **Conflicts between different statutes will not be held to exist if avoidable by reasonable construction.**
2. **Titles of acts may be resorted to in cases of doubtful construction.**
3. **Ch. 329, Laws of 1901, entitled "An act to amend village charters, and providing for the election of trustees," applies only to villages incorporated under special charters, not to those incorporated under the general charter law.**

4. Although, under ch. 11, Laws of 1911, the trustees elected in that year in a village incorporated under the general law should have been divided into two classes as therein provided, failure to so divide them was a mere irregularity not invalidating the election, and all trustees then elected were entitled to hold office for at least one year.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action of *quo warranto* to oust the defendants from the offices of trustees of the village of Kilbourn. It appears that Kilbourn was during all of the times involved in this controversy, and still is, a municipal corporation incorporated under ch. 40 of the Statutes, and the board of trustees of such village consists of a president and six trustees. In the year 1902, and prior thereto, the notice of the annual election of said village provided for the election of six trustees without specifying any length of term of office. In 1903 the notice of election provided for the election of six trustees, one half to be elected for a term of one year and one half for a term of two years. For the years 1904, 1905, 1906, 1907, 1908, and 1909 the notices of election provided for the election of three trustees for a term of two years. For the year 1910 the notice of election provided for the election of three trustees without fixing the length of term of office. The notice of election held in April, 1911, provided for the election of six trustees without fixing any length of term of office. At the election held in April, 1909, the relator *C. H. Barrett* and Harry Van Alstine and Herbert Bauer were elected trustees and duly qualified as such. At the election held in April, 1910, the relators *Frank McManman, Adam Hile,* and *M. H. Evans* were elected trustees and duly qualified as such. At the election held in April, 1911, the defendants *Fred Thomas, E. H. Inglehart, Harry Snider, Henry Tofson, Austin Stowers,* and *William Blatchley* received the largest number of votes cast and were declared elected trus-

tees for a term of one year. Subsequent to the election held in April, 1911, the relators *Frank McManman, C. H. Barrett, M. H. Evans,* and *Adam Hile* claimed to hold the offices of trustees of said village, and they appointed the relator *Arthur D. Finegan* trustee in the place of Harry Van Alstine, who had tendered his resignation as trustee to the said relators. Herbert Bauer also resigned as trustee, but no one was appointed to fill the vacancy.

The court found the above, among other facts, and as conclusions of law held (1) that ch. 329 of the Laws of 1901 had no application to the village of Kilbourn, but applied to villages incorporated under special charters only; (2) that while the election held in April, 1911, was not in accordance with the provisions of ch. 11, Laws of 1911, yet it was competent for the legislature to validate that election, and that by the passage of ch. 168 of the Laws of 1911 it did so validate it; (3) that the three trustees elected at the April election held in said village in 1910 were elected for a term of one year only; (4) that at the election held in April, 1911, the defendants were elected for a term of one year; and (5 and 6) that the defendants are the *de jure* board of trustees of the village of Kilbourn and had been such since the time they qualified for such offices, and are entitled to judgment that they have not intruded or usurped the offices of the trustees of the village of Kilbourn.

From a judgment entered accordingly the relators appealed.

For the appellants there were briefs by *Daniel H. Grady,* and oral argument by *Mr. Grady* and *Mr. W. H. Farnsworth.*

For the respondents there was a brief signed by *James F. Dougherty,* village attorney, and oral argument by *Mr. W. S. Stroud* and *Mr. Dougherty.*

VINJE, J. The relators contend that the three trustees elected at the election in 1910 were elected for a term of two years, and therefore their term of office did not expire until 1912. They also contend that at the election in 1911 only three trustees were to be elected, and that, inasmuch as six trustees were in fact elected, the election was absolutely void under the rule announced in *Att'y Gen. ex rel. Carpenter v. Ely,* 4 Wis. 420, and *State ex rel. Holden v. Tierney,* 23 Wis. 430; hence, no valid election having been held in 1911, the three trustees elected in 1909 held over, and, together with the three trustees elected for a term of two years in 1910, constituted the legal board of trustees.

The defendants' claim is that the trustees elected in 1910 and 1911 were elected for a term of one year only; that there were therefore six trustees to be elected at the election of 1911, and the defendants, having received the largest number of votes cast at that election and having been duly declared to be elected trustees, were legally elected, and constituted the legal board of trustees of said village of Kilbourn.

Whether the contention of the relators or that of the defendants is correct primarily depends upon whether or not ch. 329, Laws of 1901, applies to villages incorporated under the general charter law or only to villages incorporated under special charters, as found by the trial court. The chapter is entitled "An act to amend village charters, and providing for the election of trustees." Sec. 1 thereof provides:

"Villages that have a president and four or more trustees shall elect them as follows: The president shall be elected annually. On the first Tuesday in April, 1902, one half of the trustees shall be elected for a term of one year and one half of the trustees shall be elected for a term of two years and each year thereafter one half of the trustees shall be elected for a term of two years; provided that in villages

having an odd number of trustees, the village board shall by ordinance determine the number to be elected in 1902 for a term of one year and the number to be elected for a term of two years, which number shall be one half the number of said body as near as may be. Annually thereafter the trustees of said villages shall be elected for two years, except elections to fill vacancies, which shall be for the unexpired term."

If this law applies to villages incorporated under the general charter provisions, then it applies to all such villages, for sec. 875, Stats. (1898) (a section of the general charter law), provides for a president and six trustees for all villages incorporated thereunder. The language of the act is broad enough to apply to villages incorporated under the general charter law. But we think it is apparent from the title of the act, as well as from subsequent legislation, that it was intended to apply only to villages incorporated under special charters. The title is, "An act to amend village charters." No reference is made to any sections of the general charter law which it is claimed to amend or repeal. Every act to which our attention has been called which in any wise amends, modifies, or repeals any portion of the general charter law refers in its title to the sections of the general statutes affected. Titles of acts may be resorted to in cases of doubtful construction. *Nazro v. Merchants' Mut. Ins. Co.* 14 Wis. 295; *Mundt v. S. & F. du L. R. Co.* 31 Wis. 451. That this act applies to villages incorporated under special charters is apparent from the language in the latter part of the section relating to villages having an odd number of trustees. No village incorporated under the general law has an odd number of trustees. So it is clear the act was intended to apply at least to villages organized under special charters. In 1907 (by ch. 398 of the laws thereof) the legislature amended sec. 875, Stats. (1898), by adding thereto the words: "and a supervisor, except in counties having a population of at least 250,000." The section was rewritten with these words

added. As rewritten it provided: "At the annual charter election in each village there shall be chosen the following officers, viz.: A president, six trustees, a clerk," etc., thus clearly evincing the idea that the legislature did not consider sec. 875, Stats. (1898), as having been in any wise amended or repealed by ch. 329, Laws of 1901. Again, in 1909 the legislature, by ch. 260 of the laws thereof, amended sec. 878 of the Statutes by omitting therefrom the words "except in the office of president, which shall be filled by a special election." This section provides: "The term of office of all village officers, except justice of the peace and police justice, shall be one year and until their respective successors are elected or appointed and qualified." By the amendment of this section in dropping therefrom the words quoted, it is evident the legislature regarded that the section and all parts of it, including that which provided for a one-year term of office for trustees, was still in force. In 1911, by ch. 11 of the laws thereof, the legislature specifically amended secs. 875 and 878 of the Statutes and created sec. 875*m*, which latter section provides:

"Villages shall have a president and six trustees unless its charter shall otherwise provide and shall elect them as follows: The president shall be elected annually. On the first Tuesday in April following the taking effect of this act, one half of the trustees shall be elected for a term of one year and one half of the trustees shall be elected for a term of two years and each year thereafter one half of the trustees shall be elected for a term of two years."

Thus it will be seen that in 1911, by a specific amendment of secs. 875 and 878 and the creation of sec. 875*m* of the Statutes, substantially the same provisions were embodied in the general charter law that were in 1901 by ch. 329 of the laws thereof embodied in the charters of villages incorporated under special acts. It seems clear, therefore, that the legislature never considered that ch. 329, Laws of 1901, at any

time applied to villages incorporated under ch. 40 of the Statutes. The result indicated is not only in harmony with the legislative construction, but it is in harmony with the evident intent, purpose, and language of ch. 329, Laws of 1901, and renders subsequent legislation consistent and harmonious. Were relators' view to be adopted, we would have to assume that the legislature in 1907 and 1909 intended to amend portions of sections of the general charter law that had previously been repealed, and that in 1901 they specifically embodied in the general charter act provisions that had previously been incorporated therein by the law of 1901. The lawmakers should not be deemed to have intended such anomalous results unless no other reasonable construction can prevail. *Hite v. Keene,* 137 Wis. 625, 119 N. W. 303. It is also a cardinal principle of statutory construction that conflicts, by implication or otherwise, between different statutes are not favored and will not be held to exist if they may otherwise be reasonably construed. *Att'y Gen. ex rel. Taylor v. Brown,* 1 Wis. 513; *Att'y Gen. v. Railroad Cos.* 35 Wis. 425; *Mason v. Ashland,* 98 Wis. 540, 74 N. W. 357.

We have reached the conclusion that the trial court correctly held that ch. 329 of the Laws of 1901 applied only to villages incorporated under special charters and had no application to the village of Kilbourn. That being so, it follows that during all the time in question the village of Kilbourn should have annually elected six trustees. It also follows that at the election of 1911 six trustees were to be elected. It is true that at such election the trustees were not divided into two classes as provided for by ch. 11, Laws of 1911. The failure to do so, however, was a mere irregularity and did not invalidate the election itself. Ch. 11 provided for the election of six trustees, none of whom were to serve for less than one year. Therefore all who were elected in 1911 would be entitled to hold the office for at least one year from

the date of their election. It was to test their right to hold office during such year that the present action was instituted. Hence it follows that the trial court properly entered judgment declaring the defendants to be the duly elected, qualified, and acting trustees for such year, and that the relators had no right, title, or claim to the offices.

The result reached renders it unnecessary to consider or determine the validity of ch. 168 of the Laws of 1911, and we express no opinion as to its constitutionality.

By the Court.—Judgment affirmed.

BORNER, Appellant, vs. CITY OF PRESCOTT and others, Respondents.

May 14—June 4, 1912.

Municipal corporations: Bonds for improvements: Statutes construed: Double purpose: Intent: Presumption: Constitutional law: Provision for collection of tax: Levy: Amounts: Option to pay in instalments: Interest: Departure from ordinance: Injunction: Taxpayers' action: Defense arising after commencement: Judgment: Modification on appeal.

1. The statute (sec. 925—133, Stats. 1898) relating to the issuance of municipal bonds for public improvements must be liberally construed to effectuate the purpose intended.
2. An ordinance under that statute providing for the issuance of bonds "to defray the cost of constructing waterworks and connecting sewers" does not necessarily include a double purpose, but in support of the validity of the ordinance it should, if necessary, be presumed that but a single scheme was intended, requiring connecting sewers as part of it.
3. The requirement of sec. 3, art. XI, Const., that no municipal bonds shall be issued until the municipality shall first "provide for the collection of a direct annual tax sufficient to pay the interest as it falls due, and also to pay the principal within twenty years," is satisfied by an ordinance levying *in præsenti* a tax of the requisite amount, specifying the sums to be

raised each year, since the duty of collecting the tax in the usual way is thereby imposed upon the proper officers by force of law, and its performance may be compelled by *mandamus*. *Kyes v. St. Croix Co.* 108 Wis. 136, and *Bingham v. Milwaukee Co.* 127 Wis. 344, distinguished.

4. The tax levied for any one year need not be for the precise amount payable that year, but it is enough that the sums as levied suffice to meet the principal and interest as they mature.
5. The provision of the statute that "all such bonds shall be payable at the option of the city in annual instalments," means only that the city may, at its option, make the bonds payable all at one time or a part of them each year.
6. The provision that the bonds "shall bear interest not exceeding six per cent. per annum payable semi-annually," does not require the interest to be paid semi-annually, but only that the amount to be paid shall not exceed semi-annual interest at the rate named.
7. An ordinance provided for issuance of bonds to mature all at one time, but without amending it the city proposed to insert in the bonds a provision giving it an option to retire certain amounts at certain times before maturity. In an action by a taxpayer to restrain the issuance of the bonds the city answered that it had abandoned the purpose of departing from the ordinance, and at the time of the trial it intended to conform strictly to the terms thereof. Plaintiff having, however, persisted with the case upon the ground stated and upon other grounds which were untenable, it was proper to dismiss the action with costs, for the reason that it had been unnecessarily pursued to the prejudice of the city; but the judgment of dismissal, having inferentially passed upon and approved the option form of bonds, is modified on appeal so as to leave that question undetermined.

APPEAL from a judgment of the circuit court for Pierce county: JAMES O'NEILL, Judge. *Modified and affirmed.*

Taxpayer's action to restrain issuance of bonds by the city of *Prescott*. The issues, as to facts, were determined thus:

All facts exist affording plaintiff, suing as he did, legal capacity to maintain the action, if the proposed bonds would be illegal, and defendants are proper parties.

September 6, 1910, the common council of defendant city passed an ordinance purporting to authorize issuance of the bonds in question, such ordinance containing recitals showing that they would not exceed the city's legal capacity to incur indebtedness, and providing, in terms or effect, as follows:

The city of *Prescott* shall issue $17,350 of municipal bonds to defray the cost of constructing waterworks and connecting sewers in such city, pursuant to ch. 235 of the laws of the state of Wisconsin for the year 1907. The bonds shall be in denominations of one thousand dollars or five hundred dollars, except one of three hundred and fifty dollars; each shall be dated December 15, 1910, made payable December 15, 1930, and bear interest at four and one-half per cent. per annum, payable annually, both principal and interest payable at the office of the city treasurer. There is hereby levied on all taxable property in the city of *Prescott* thirty-two thousand nine hundred and sixty-five dollars, of which seventeen thousand three hundred and fifty dollars is for payment of the principal of said bonds and the balance for payment of the interest thereon. Said total sum shall be collected, sixteen hundred and forty-eight and 25/100 each year, commencing with 1911, to and inclusive of 1930. The amount collected each year over and above sufficient for the interest as the same falls due shall constitute a sinking fund to be conserved and devoted to paying the principal of the bonds at maturity.

Pursuant to such ordinance the city of *Prescott,* acting by its proper officers, advertised for bids for said bonds and, in due course, accepted the offer of H. T. Holtze & Co. therefor, the same to be dated and made payable according to the ordinance and to contain a provision giving the city the option to take up $3,000 thereof in three years from date, $4,350 in ten years from date, and $5,000 in fifteen years from date, and $5,000 in twenty years from date.

Up to the commencement of the action the city officers proposed issuing the bonds in accordance with said accepted offer. Thereafter the option feature was withdrawn by the

bidder and such officers abandoned the idea of selling bonds otherwise than in conformity to the ordinance and laws of the state in respect to the matter.

The complaint contained allegations in conformity to the findings as to the status of things at the time the action was commenced.

As conclusions of law the trial court held that the complaint failed to state a cause of action; that defendant city, by virtue of the ordinance, providing as indicated in the findings, possessed authority to issue the bonds on the offer of H. T. Holtze & Co. with the option feature thereof, and that the action should be dismissed with costs. Judgment was rendered accordingly.

For the appellant there was a brief by *White & Skogmo* and *W. C. Owen,* and oral argument by *Mr. Owen.*

For the respondents there were separate briefs by *Jesse S. Field* and *Spencer Haven,* and oral argument by *Mr. Haven.*

MARSHALL, J. The respondents had power under sec. 925—133, Stats. (1898), as amended by ch. 235, Laws of 1907, to issue municipal bonds for constructing waterworks and sewers. The language thereof necessary to be examined is as follows:

"All such bonds issued shall be payable at the option of the city in annual instalments, the last instalment being payable not more than twenty years after their date, and shall bear interest not exceeding six per cent. per annum payable semi-annually, and that the council shall have provided for the collection of a direct annual tax sufficient to pay the interest thereon as it falls due and to pay and discharge the principal thereof within twenty years from the date of the issue of such bonds."

The main question is, Does the ordinance and proceedings to adopt it satisfy such section? The language of the law, it must be confessed, is not free from ambiguity. However, the purpose is plain. It was to enable municipalities to obtain,

without unduly burdening taxpayers, means for making public improvements, on favorable terms. It must be liberally construed to that end by a very familiar rule. Any meaning which would render it absurd, difficult to comply with, or impair the character of the securities in the judgment of investors, is to be rejected in favor of a contrary meaning, if the language reasonably expresses both meanings. None should be given thereto, if it can reasonably be avoided, which would violate the plain purpose.

In certain cases, under certain conditions, including the present instance, an ordinance authorizing issuance of bonds under such section does not require a vote of the electors.

The vote by the council was, as indicated in the ordinance, to issue bonds "to defray the cost of constructing waterworks and connecting sewers." It is said that includes a double purpose and one act of voting, which counsel insist was unqualifiedly condemned in *Neacy v. Milwaukee,* 142 Wis. 590, 126 N. W. 8. Not so, the question there was different from the one here. There was a distinct double purpose. Bonds could be legally issued but for one of them. The proposition embodying the two was submitted and acted upon by the electors as a single matter. In such circumstances, it was held, that the illegitimate purpose might have been the controlling one in securing the favorable vote; so, it could not be seen whether the electors would have decided in favor of the bonds for the legitimate purpose, by itself, or not.

Here, as indicated, if it be conceded there was a double purpose, both were within the statute. Whether, in such a case, submission of the matter to the council by a single proposition would satisfy the statute, we need not decide. Certainly it would not be within the condemnation of *Neacy v. Milwaukee, supra.* Furthermore, the fact that here the vote was by the common council, not the electors, might make a difference.

But it is considered the purpose, as the council understood

the matter, was not, necessarily, double. If it was improper to include two matters in a single proposition, it must be presumed the council did not so intend, if a legal intent can be reasonably read out of the language used. It is fair to assume, from such language, that there was a single scheme requiring connecting sewers as a part of it. That the two elements were so treated as one, can be fairly seen in the ordinance. That being so, it would hardly do to hold the connecting sewers, necessarily, involved a purpose distinct from the waterworks for the purpose of condemning the action of the common council as void, unless the contrary would be highly unreasonable from any viewpoint.

The next proposition is, that the ordinance does not "provide for the collection of a direct annual tax sufficient to pay the interest" on the bonds "as it falls due and discharge the principal thereof within twenty years from the date of the issue of such bonds." That was incorporated into the statute to comply with the language of sec. 3, art. XI, of the constitution, adopted in 1874. The wording thereof is this:

"Any county, city, town, village, school district or other municipal corporation incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same."

The purpose of the provision is obvious as has been heretofore stated by this court. *Kyes v. St. Croix Co.* 108 Wis. 136, 83 N. W. 637; *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071. It is to prevent issuance of bonds in advance of irrevocable provision being made to raise whatever money will be necessary to seasonably satisfy the obligations thereof, leaving only the matter of performing plain duty on the part of public officers, which can be compelled, if necessary, by

mandamus. Difficulty had been experienced by municipalities voting bonds and obtaining money thereon and then refusing to vote and collect the necessary tax to pay the same; thereby greatly injuring public credit and tending to render it impracticable for public corporations to borrow money except at a ruinous rate of interest, if at all.

A vote levying *in præsenti* a direct annual tax sufficient to meet the case is a provision for the collection of the tax. A vote levying a tax is a vote that the amount contemplated shall be collected by taxation in the ordinary way. A vote levying an annual tax for a specific number of years is one that the amount contemplated shall be each year collected in the ordinary way. The statute does not contemplate any particular collection of words so long as its object be satisfied. Language, in terms, levying, *in præsenti,* a direct annual tax on all the taxable property of a municipality sufficient to pay the interest on specified bonds as it falls due and to pay and discharge the principal thereof as they mature, using the language of the statute, substantially, only varied to meet the particular case, would doubtless be sufficient. The dominating thing is to require the creation of an official duty on the part of the municipal officers to collect, annually, from or on account of the taxable property, the necessary amount of money; that each year such amount will, at the proper time, be, by the proper officers, spread upon the tax roll, as a direct tax upon the taxable property of the municipality, and be, *by the proper officers,* duly collected.

The word "levy" in tax matters has various meanings according to how it is used. *Bradley v. Lincoln Co.* 60 Wis. 71, 18 N. W. 732; *Southern R. Co. v. Kay,* 62 S. C. 28, 39 S. E. 785; *Hohenstatt v. Bridgeton,* 62 N. J. Law, 169, 40 Atl. 649; *State v. Lakeside L. Co.* 71 Minn. 283, 73 N. W. 970. Thus, the meaning is to be discerned by the context in the particular instance, as said often in decisions: "It is some-

times used for the purpose of conferring all the powers incident to the creation and collection of a tax," *Southern R. Co. v. Kay, supra,* or requiring all things to be done in order to procure the taxes, *Hohenstatt v. Bridgeton, supra.*

So a vote levying a tax includes all necessary to be done to realize on it,—levying, in the sense of spreading the amount on the tax roll and the collection of it by the proper officers, including the levying upon—seizing if necessary—property subject thereto; because, when a tax is voted or a vote is had levying a tax, the duty necessarily follows, by force of law, for the proper officers to take the necessary steps to collect the same and that may be compelled by *mandamus.*

Applying the foregoing to the ordinance in question, the words "There is hereby levied on all the taxable property in the city of *Prescott* thirty-two thousand nine hundred and sixty-five dollars," standing alone, would require the city clerk to spread that amount on the next tax roll of the city and, the clerk having performed his duty in regard to it, the treasurer to collect the same. In other words, it would be a provision, *in præsenti,* for the collection, as a tax for the particular year, of the sum named. But the language does not stand alone. It is modified by the provision requiring the collection each year, during the life of the bonds, of a specified amount for interest and a specified amount for principal, enough as appears "to pay the interest of the bonds as it falls due and to discharge the principal thereof" at maturity and "within twenty years from the date of issue." It seems that the statute on the subject was fully complied with.

The difficulty in *Kyes v. St. Croix Co.* 108 Wis. 136, 83 N. W. 637, was that, instead of levying or voting the tax, *in præsenti,* so that no subsequent county board would have anything to do with the matter in case of the bonds being issued in the meantime, the language of the resolution was "There shall be annually levied by the county board." So the ques-

tion was whether that was a present provision for the collection of a direct annual tax sufficient to seasonably meet the obligation created by issuance of the bonds. It was not thought but that, had the resolution been to the effect that, there is hereby levied a direct annual tax sufficient to satisfy the requirements of the statute, it would be all that was necessary; but, that one county board cannot bind a succeeding one; that the language used only amounted to a promise that any future county board would formally levy the necessary amount of taxes, leaving bondholders with no remedy in case of default but to bring suit to collect which was the very condition the constitutional provision and the statute intended to prevent. "The rule of the statute," said the court, is that before or at the time of the issuance of bonds there shall be "cast upon the ministerial officers an imperative and irrevocable duty to collect the money to pay" the interest and principal when they collect other taxes. Such was done in this instance.

Counsel rely upon *Bingham v. Milwaukee Co.* 127 Wis. 344, 106 N. W. 1071, where the language of the ordinance was somewhat different than in this case, in that, it, in terms, made a present levy of a specified amount to pay bonds falling due, and a specified amount to pay interest, for each year during the life of the bonds; and this court, in deciding the point at issue, said: Following the rule of *Kyes v. St. Croix Co., supra,* "It is evident that the action taken in the present case was correct, and indeed the only action which would satisfy the constitutional and statutory requirements."

It must be confessed that such language, viewed apart from its context and the point under discussion, might condemn the action of the council in this case. But the court was merely speaking about the necessity of a present levy of a tax to provide for the obligations created by the bonds, not about any particular phrasing in respect to the matter. There was a

present levy of the tax,—that was conceded,—and there was no question raised but that it might have been accomplished in other ways, as by naming a sufficient sum for each year to keep up payments as they became due, or levy a sufficient sum for each year, leaving the particular amount to mathematical computation by the taxing officers. But the question was, as to the power of one board to levy a tax for any beyond the current year. That was decided in the affirmative. To the feature of the ordinance accomplishing that, this language was used: "The action was the only action taken which would satisfy the statutory requirements." If specified amounts had been levied each year, not specially with reference to the bonds and interest falling due in such year, but, money "to pay the interest" on the bonds as it would fall due "and to pay and discharge the principal" at maturity, that being within twenty years from the date of the bonds, or the council had voted an annual tax of a sufficient sum therefor so that the particular amount required each year for bonds and interest falling due such year would be a mere matter of computation, doubtless the court would have used the same language, since the only point was whether the board could levy a tax for a subsequent year.

The next proposition presented is that the ordinance does not provide that the bonds shall be payable in annual instalments at the option of the city. The language of the statute as to that cannot well mean that every bond shall be paid in instalments, and that there shall be an option clause therein which may be exercised, from time to time, at the pleasure of the city after issue of the bonds. That would make the law quite absurd, since it evidently contemplates issuance of bonds in the ordinary way, with interest coupons, if desired. So the language must be taken to mean that, the municipality may, at its option, make the bonds payable all at one time, or in instalments from time to time,—that is, a specified number of bonds each year.

The next point is, that the ordinance does not provide that the interest on the bonds shall be paid semi-annually. The word "semi-annually" is used in the statute, as will be seen, in this connection, "not to exceed six per cent. per annum, payable semi-annually." It is considered that the legislative intent was not to require the interest to be paid semi-annually, but to limit it so that the amount paid for use of money borrowed should not exceed semi-annual interest at the rate named.

The further point is made that the city had no authority under the ordinance to make the bonds payable, a specified number at the end of each of several specified terms, as contemplated by the accepted bid, instead of all December 15, 1930, as contemplated by the ordinance. It is a sufficient answer thereto that the city abandoned the purpose of departing from the ordinance, so alleged in its answer, and at the time of the trial intended to conform strictly to its terms. If when the answer came in appellant had offered to take judgment as prayed for with costs up to that time, upon the ground that the purpose was to depart from the ordinance when the action was commenced, there might be some merit in the appeal as to this particular feature. We are inclined to hold that, technically, the city had no right to depart from the ordinance, except by amending it. Whether the proposed departure worked any prejudice at all to taxpayers which would justify equitable interference is another question.

Since the appellant persisted with the case on all points raised, after the answer came in, the trial court might well have dismissed the action with costs to the respondents upon the ground that it had been unnecessarily pursued to the prejudice of the city after all danger was over, which, in any event, was a proper subject of complaint, leaving the subject of whether the city could properly sell the bonds according to the terms of the bid, which is by no means free from doubt, out of the case. It is thought best to modify the judgment,

so far as it might be construed with reference to the ordinance as covering that matter, and to affirm it as a mere judgment of dismissal on the merits otherwise, which may be done without passing, one way or the other, on the matters unnecessarily included in the findings and inferentially in the judgment.

By the Court.—Judgment is so ordered with costs to the respondents.

KLOOZ, Respondent, vs. HOOD, Appellant.

May 14—June 4, 1912.

Boundary lines: Adverse possession.

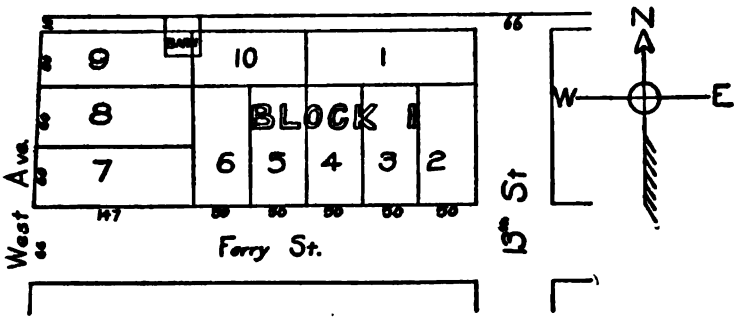
Evidence in ejectment *held* to sustain a finding by the court that the disputed strip had been adversely possessed by plaintiff for more than twenty years.

APPEAL from a judgment of the circuit court for La Crosse county; E. C. HIGBEE, Circuit Judge. *Affirmed.*

The action is ejectment for a small strip of land about six feet wide and twenty-five feet long in block 1 of Rublee & Ober's subdivision, a part of Rublee & Gillette's addition to the city of La Crosse. A substantially correct map of said block as it appears on the recorded plat of the subdivision is here given in order to make clear the contentions of the parties. It will be understood that the small square marked "Barn" upon the map is not upon the plat as recorded.

The plaintiff has record title to lot 6 and the west half of lot 10, the defendant record title to lot 9. The controversy is as to the location of the line between lots 9 and 10. The various owners of the lots on the north side of the block have always occupied those parts of the ten-foot strip north of their respective lots as part of their respective holdings, although the strip never was included in their deeds. This strip is in fact about twelve and one-half feet wide. It appears that

prior to October, 1910, the defendant maintained a barn upon lot 9, the east side of which barn stood a short distance west of the line between lots 9 and 10, and that during said month he moved the same easterly a number of feet. The plaintiff claims that the defendant moved the barn so far east that it encroached upon lot 10 a distance of nearly six feet. The square which is marked "Barn" on the map indicates the position in which, according to the plaintiff's contention, the



barn now stands. On the other hand, the defendant claims that no part of the barn encroaches upon lot 10. The action is brought to recover possession of a strip of land 5.9 feet in width at the north end, 6.5 feet in width at the south end, and 24.4 feet in length, covered by the east side of the barn. It will be seen by reference to the map that the north part of the strip in controversy is in the ten-foot strip outside of the platted limits of lot 10. It appears that West avenue was laid out upon a section line, and that the section lines in the city of La Crosse incline very markedly to the east. It is claimed by the plaintiff that Thirteenth street runs due north and south, and that the lot lines in the block are laid out either parallel to, or at right angles with, Thirteenth street. If this be correct, then there is no doubt that the defendant's barn extends over upon plaintiff's lot, as she claims. On the other hand, the defendant

claims that the north and south lines in the block are parallel to West avenue. If this be the fact, then the north line of lot 9 must necessarily be of the same length as the south line of lot 7, *i. e.* 147 feet, and in this event the east side of the barn as at present located would be just within the lines of lot 9. Only one of the original monuments which were set when the plat was originally surveyed is in existence, and that is more than a block distant from the line in question. There was evidence on behalf of the plaintiff tending to show adverse possession by the plaintiff and her grantors of the strip in controversy for more than twenty years before the commencement of this action, and the court (trial by jury having been waived) found such adverse possession to have been proven and rendered judgment for the plaintiff, from which judgment this appeal is taken.

C. L. Hood, appellant, in person.

For the respondent there was a brief by *Bunge & Bosshard,* and oral argument by *G. W. Bunge.*

WINSLOW, C. J. The judgment appealed from is to be based upon the finding of adverse possession of the disputed strip by the plaintiff and her grantors for more than twenty years prior to the removal of defendant's barn, and it is frankly admitted by the appellant that unless this finding be overturned there is no necessity of considering any other questions.

This is purely a question of fact involving no consideration of legal principles, but simply a review of the evidence. We have carefully made such a review, and find that there is ample evidence to the effect that the plaintiff and her grantors, through their various tenants, used the disputed strip as a driveway for considerably more than twenty years prior to the removal of the defendant's barn. No extended review of the evidence would be of any value.

By the Court.—Judgment affirmed.

KETCHUM, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent.

May 15—June 4, 1912.

Railroads: Injury to employee: Projecting car door: "Defect:" Statutes: Construction: Liability dependent on negligence: Evidence: Changing finding by jury: Jurors: Misconduct: Prejudicial effect: Appeal: Grounds for reversal: New trial: Motion after term: Excusable neglect: Discretion.

1. The words "a defect," as used in subd. 1, sec. 1816, Stats. (Laws of 1907, ch. 254),—relating to liability of a railroad company for "an injury caused by a defect in any locomotive, engine, car," etc.,—mean an existing unsafe and dangerous condition, the result of actionable negligence attributable to the railroad company under the conditions provided by the statute.
2. The amendment of subd. 1, sec. 1816, Stats. (1898), by ch. 254, Laws of 1907, by omitting therefrom the words "if such defect could have been discovered by such company by reasonable and proper care, tests, and inspection," etc., when considered in connection with the other changes made in the section and the text of the amending act as a whole, does not evince a legislative intent to impose an absolute liability upon railroad companies for all injuries sustained by employees by reason of defects in cars or other appliances specified; and such liability exists only where the injury is attributable to some negligence on the part of the company.
3. To warrant the trial court in changing a jury's finding, supported negatively by the railroad company's inspection record and by evidence that no one had observed any displacement, that the door of a box car by which plaintiff was struck was in its normal position when the train left the last station prior to the accident, there should be an affirmative, uncontradicted showing that the door was then and there out of place.
4. The jury having found as stated, and there being no evidence tending to show that the railroad company was negligent in failing to observe that the car door became displaced in going to the next station, a distance of fourteen miles, no legal liability of the company for an injury to a brakeman who was struck by the projecting edge of the door was shown.

5. The conduct of jurors, while considering their verdict in an action by a brakeman for personal injuries, in requesting the attending officer to procure for them the measurements of certain cars and an engine tender in defendant's yards, and of the officer in complying with such request, was not only improper but highly censurable, regardless of its effect upon the verdict.
6. But, where the information so obtained had no apparent bearing upon the question of defendant's negligence, and the trial court, upon a motion for a new trial based on affidavits showing the facts, decided that it had no effect upon the verdict, such misconduct does not justify reversal of a judgment in favor of the defendant, especially since the enactment of ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), which requires an affirmative showing of error affecting the substantial rights of the appellant. *Havenor v. State*, 125 Wis. 444, distinguished. TIMLIN, J., dissents.
7. The right of the trial court to entertain a motion for a new trial, after the term, based upon misconduct of the jury, rests upon sec. 2832, Stats. (1898), and in the present case its discretion in that regard does not appear to have been abused.
8. Upon a motion under sec. 2832, Stats. (1898), an affidavit of advice of counsel is not required.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Affirmed.*

This is an action to recover damages for personal injuries sustained on January 23, 1909, through the alleged negligence of the defendant in failing to have the door of a certain box car properly fastened, and in placing the car in the train on which the plaintiff was working while the door was swinging out from the side of the car a distance of eight inches, thereby causing the injuries to the plaintiff through the door coming in contact with him and causing him to fall under the train.

At the time of the injury the plaintiff was acting as head brakeman on defendant's freight train. The car which caused the injury to the plaintiff was put into the train at Eau Claire. At Rusk, a distance of about fourteen miles from Eau Claire, the plaintiff was injured. He testified that when he alighted

from the tender of the engine at the station platform at Rusk, while the train was moving at the rate of about four miles per hour, he was struck on the shoulder by a projecting side door and thrown down and under the wheels of the cars, suffering the injuries for which he seeks recovery.

The jury by their special verdict found:

"(1) At the time of plaintiff's injury, did the lower front corner of the south door of car No. 86974 extend outward and away from its usual and normal position against the side of the car? We answer: Yes.

"(2) If you answer 'Yes' to the last question, then answer this: At the time of plaintiff's injury, how far did the said lower front corner of the said door mentioned in the last question extend to the south beyond its usual and normal position against the side of the car? We answer: Eight inches.

"(3) If you answer question No. 1 'Yes,' then answer this: Would a person of ordinary prudence and experience in running and handling of freight trains, knowing the condition of said door as it was at the time of plaintiff's injury, and in the exercise of his customary care, have anticipated that some employee engaged in the running of said train might probably be injured through being struck by the said door while in the pursuit of his duties about said train? We answer: No.

"(4) Was the bottom of the car door mentioned in question No. 1 in its normal and usual position against the car when the same left Eau Claire on the morning of plaintiff's injury? We answer: Yes.

"(6½) Was plaintiff struck by a projecting car door, which caused him to fall under the train at the time of his injury? We answer: Yes.

"(7) Was the plaintiff at the time of his injury guilty of any negligence which contributed proximately to his injury? We answer: Yes."

The other questions of the verdict and the damages are not material to the issues raised on this appeal.

There was evidence upon the trial that projecting side doors were quite common in the operation of freight trains; that

they were frequent upon all railroads; that, ordinarily, they were caused by a shifting of the carload while the car was in transit; that it was the duty of the railroad employees to replace doors out of place and to reseal and fasten them at small way stations, if this could be done without unloading the car, and that, if it could not be replaced without unloading, the car was allowed to go to a division point with the door projecting; that car inspectors did not consider a car with a projecting door defective and would not note such a condition if it was discovered during an inspection; that the reason for securely fastening the doors on freight cars was the desire to assure the security of the freight; and that the train to which the car in question was attached had been running at an unusually high speed just before the accident, and that such speed was liable to throw the load of a car against the car door and spring it out into the position here testified to.

The evidence also tends to show that the employee who sealed the car in question when it was loaded had not reported anything wrong with the car at that time; that the car inspectors at Eau Claire observed nothing defective in the car and made no report showing a defective condition; that this particular car could not have been sealed unless the bottom of the door was in its normal and usual position against the side of the car; that the inspectors at the terminal station to which the car was carried after plaintiff was injured observed nothing about the car which would be reported in their records as a defect.

It appears that the plaintiff was an old railroad man; that cars were of different widths, and many cars would project farther beyond the rails than would this comparatively narrow car with the door projecting as plaintiff testified it did. There is evidence justifying the inference that the plaintiff alighted from the tender in such a way that he would probably have fallen to the ground, if he alighted as he described it; and that the plaintiff had stated immediately after the in-

jury was received, in response to a question of how the accident had happened, that he had slipped.

Plaintiff moved that the verdict be changed in certain particulars and for judgment on the verdict as so changed, and, in the event of a denial of this motion, for a new trial. The defendant moved for judgment on the verdict, or in the alternative for judgment notwithstanding the verdict. On June 16, 1910, a day of the March term of the trial court, an order was made granting defendant's motion for judgment on the verdict. Judgment was duly entered on this order on July 2, 1910. On July 8, 1910, the plaintiff served notice of appeal from the judgment, and on August 1, 1910, served a proposed bill of exceptions. On August 6, 1910, the case was by stipulation continued to the January, 1911, term of the supreme court, and the clerk was authorized to return the record to the clerk of the trial court. On August 11, 1910, the record was received by the clerk of the trial court. The March, 1910, term of the trial court ended on September 12, 1910, and was not adjourned.

On September 10, 1910, the plaintiff moved the supreme court, on an order to show cause and certain affidavits, that the record and the cause be remanded to the trial court to enable plaintiff to make the motion for a new trial. On October 4, 1910, this motion was denied by this court. This motion was made to enable the trial court to entertain a motion for a new trial upon the grounds that the jury had improperly called for evidence from the officer in charge, that on or about August 11, 1910, the plaintiff was apprised that such misconduct had taken place, and that plaintiff's counsel had proceeded diligently to collect the evidence to establish these facts. On January 17, 1911, the appeal pending in this court was dismissed by the plaintiff and the record returned to the trial court. On February 24, 1911, the plaintiff moved for a new trial, that the judgment be vacated, the verdict set aside and a new trial granted on account of the misconduct of the

jury and the officer in charge during their deliberations, and to amend the bill of exceptions. On June 29, 1911, the court denied the motion for a new trial, but allowed the amendment of the bill of exceptions so as to include the proceedings relative to the motion for a new trial on the ground of misconduct of the jury.

This is an appeal from the judgment and from the order of June 29, 1911.

For the appellant there was a brief by *Samuel A. Anderson* and *W. H. Stafford,* and oral argument by *Mr. Anderson.*

For the respondent there was a brief by *Jas. B. Sheean* and *Bundy & Wilcox,* and oral argument by *R. P. Wilcox.*

C. H. Van Alstine, as a friend of the court, also filed a brief and argued orally as to the construction due to sec. 1816, Stats. (1898), as amended by ch. 254, Laws of 1907.

SIEBECKER, J. The appellant assails the court's ruling denying him judgment on the verdict of the jury. The argument is that the facts found show that there was a defect in the car, namely, a projection of the car door outside of its normal position to the extent of eight inches, and that this projection of the car door caused him to fall under the train and produced his injuries, and that the defendant is therefore liable. This claim is based on the idea that sec. 1816, Stats. (1898), as amended by ch. 254, Laws of 1907, imposes an absolute liability on railroad companies for all injuries sustained by employees caused by a defect in any car or other appliance specified in the statute and used by such employees in and about the business of their employment. This claim has not heretofore been presented under this statute. The ground of this contention is that the changes made in the phraseology of sec. 1816 by the amendments to it in ch. 254, Laws of 1907, indicate that the legislature intended that railroad companies should be absolutely liable for such injuries, regardless of their negligence or of the contributory negli-

gence of the person injured. The amendment to subd. 1 of this section omitted therefrom the words, "if such defect could have been discovered by such company by reasonable and proper care, tests or inspection; and proof of such defect shall be presumptive evidence of knowledge thereof on the part of such company." Were this change of subd. 1 of this statute the only amendment, the argument of plaintiff's counsel might be persuasive in favor of the claim made by them. We must, however, consider all of the changes made in this section of the statute by ch. 254, Laws of 1907, and ascertain therefrom what the legislative intention was in amending this law regulating the liability of railroad companies for injuries sustained by their employees. The context of the amending act (ch. 254, Laws of 1907) discloses that the provisions thereof were based on the idea of responsibility for negligence, and subd. 1 of the statute is a part of and must be read in connection with the subsequent provisions. The provisions of the act, as a whole, evince a purpose to frame a scheme for regulating by statutory rules the liability of railroad companies for injuries to employees arising from a want of care of both the employer and the employee under the special conditions and circumstances for which a procedure in actions to recover damages for such injuries is prescribed. The provisions of the different parts of the act are so interrelated as to require that they be interpreted together in order to ascertain their meaning and the object sought to be accomplished by the legislature. Examining the statute from this viewpoint and giving effect to all of its parts, it is obvious that subd. 1 refers to and regulates liabilities for injuries resulting from actionable negligence, under the circumstances embraced therein. The first paragraph of the act, providing that liability shall be "subject to the provisions hereinafter contained regarding contributory negligence on the part of the injured employee," indicates in unmistakable terms that it pertains to injuries which result from negligence. The declaration respecting con-

tributory negligence, in its legal sense and implication, is that the legislature was dealing with injuries arising from negligence, and shows that the statute has no reference to injuries resulting from wilful misconduct or mere accident and that it can refer only to injuries resulting from negligence as the term is applied in the law. Furthermore, the terms "every action" in subd. 3, "all cases" in subd. 4, and "all cases under this act" in subd. 5 of the act, obviously refer to and embrace all cases of injuries comprehended in the preceding paragraphs and exclude the idea that any of the cases arising within the statute are not subject to these provisions of the act.

In the light of this meaning of the statute, there is no room for the argument that the defendant is liable to the plaintiff for injuries resulting from the defect in the car regardless of defendant's negligence or of the plaintiff's contributing negligence. The words "a defect," as used in subd. 1 of sec. 1816, must be held to mean an existing unsafe and dangerous condition, the result of actionable negligence attributable to the railroad company under the conditions provided by the statute. In the following cases the statute was so applied, though the question for construction here presented was not specifically submitted or discussed: *Kiley v. C., M. & St. P. R. Co.* 138 Wis. 215, 119 N. W. 309, 120 N. W. 756; *Haring v. G. N. R. Co.* 137 Wis. 367, 119 N. W. 325; *Boucher v. Wis. Cent. R. Co.* 141 Wis. 160, 123 N. W. 913; *Kiley v. C., M. & St. P. R. Co.* 142 Wis. 154, 125 N. W. 464; *Tidmarsh v. C., M. & St. P. R. Co.* 149 Wis. 590, 136 N. W. 337.

It is contended that the court erred in denying plaintiff's motion to change the jury's answer to question 4, finding that the bottom of the car door was in its normal and usual condition when the train left Eau Claire. There is no direct evidence that the door was out of position at Eau Claire, and it appears from plaintiff's evidence that it was first observed at Rusk to be out of place. The facts and circumstances show that no one observed any displacement of the door at

Eau Claire and the inspection record tends to show that the door was then in its normal position. This furnished sufficient evidentiary basis to sustain the jury's finding that the door was not out of place at Eau Claire. To warrant a disturbance of this finding by the court required an affirmative, uncontradicted showing that the door was then and there out of place. This is not the state of the evidence, and hence the court properly denied plaintiff's motion to change the answer to question 4.

There is no evidence tending to show that the railway company was negligent in not observing that the door became displaced in going from Eau Claire to Rusk, a distance of about fourteen miles. The fact is established, then, that the company did not negligently cause this defect in the car door which plaintiff alleges caused his injuries, and it follows that no legal liability on the part of the defendant for the damages the plaintiff suffered was shown. In this state of the case it is unnecessary to discuss other questions presented by the appellant respecting the insufficiency of the verdict, or any other questions raised regarding the verdict, because they do not affect the result of the finding in question 4, which establishes that the defendant did not negligently cause the defect complained of.

It is strenuously contended that the court erred in denying plaintiff's motion for a new trial on account of the misconduct of the jury and the officer in charge, after the jury had retired to deliberate upon their verdict. It appears that the jury, during their deliberations on their verdict, requested the officer in charge to procure for them the measurements of cars and an engine tender in defendant's yards at Menomonie, and that the officer obtained the requested measurements and furnished them to the jury. These facts are properly shown by the affidavits presented to the court. This extraordinary conduct of the jurors and the officer calls for action by the trial court imposing appropriate punishment

on the offenders. It is clearly reprehensible, regardless of whether or not it in fact prejudicially affected the verdict rendered, and an honest and proper administration of the law calls for the imposition of appropriate punishment by the trial judge on the offenders. The exercise of the judicial functions of trial courts, in order that they may so apply their powers as to attain impartial trials and prevent jurors and officers from indulging in conduct that is incompatible with the high standard necessary to secure the best results in the administration of justice, must rest in their sound judgment, and we doubt not that it has been fully invoked on all proper occasions.

It is argued that this case is ruled by the decision in *Havenor v. State,* 125 Wis. 444, 104 N. W. 116. We do not regard the misconduct here complained of as within the decision of that case. In that case it was held that all communication by the trial court with the jury, after they had retired to deliberate on their verdict, in the absence of the parties and their counsel, is prohibited unless it be in open court, and that no party should be put to the burden of showing that such a communication was in fact prejudicial. The reason for such a rule, where the trial judge is involved, is obvious. No party should be required to bear the burden of convincing a trial judge that his conduct has prejudicially affected a verdict. The doctrine of that case has been adhered to in the subsequent case of *Hurst v. Webster Mfg. Co.* 128 Wis. 342, 107 N. W. 666, and in the case of *Du Cate v. Brighton,* 133 Wis. 628, 114 N. W. 103, but is not to be extended to cases arising out of different circumstances. *Sedlack v. State,* 141 Wis. 589, 124 N. W. 510. In the instant case the fact is that the jury requested the officer to ascertain the exact measurements of a car and an engine tender, and it does not deal with an improper communication to the jury by the trial judge under whose direction they

were performing their duties in the case. True, their conduct was improper, but from its nature it is not to be treated as coming within the rule of the *Havenor Case,* for it could be impartially considered by the trial judge and he could ascertain whether or not it operated prejudicially against the party complaining of the verdict. Unless the record discloses that it affected the substantial rights of the complaining party, within the provisions of sec. 2829, Stats. (1898), it should be disregarded. We must then test the ruling on this motion by the provisions of this section:

"The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect."

The trial judge, in passing on appellant's motion for a new trial, evidently concluded that the jurors' misconduct did not affect the verdict they rendered. Obviously, the trial judge is in a situation where he is best informed of the probable effect, if any, such conduct would have on the verdict. The trial judge's denial of the motion for a new trial must have been based on his belief that the jurors' misconduct in no way affected the verdict and the result of the trial. His conclusion on the subject is of much weight in determining the point on appeal to this court, and should not be disturbed unless it satisfactorily appears that he erred in this respect. We find nothing in the record that leads us to a belief that the ruling of the trial court was clearly erroneous. It is apparent that the forbidden evidence has no bearing on the finding embraced in question 4. This supports the trial judge's view that it had no weight with the jury in deciding the issue of the defendant's negligence respecting the existence of the defect in the car door. All the reasonable inferences are that the improper information so acquired had no effect upon their

finding that the defendant did not negligently cause the door to be out of place when the train arrived at Rusk. Ch. 192, Laws of 1909, now sec. 3072*m*, Stats., declares that no judgment shall be reversed or set aside or a new trial granted upon the grounds here urged, "unless in the opinion of the court, . . . it shall appear that the error complained of has affected the substantial rights of the party seeking" such relief. In applying the rule of this statute it is necessary that the record show affirmatively that the trial court erred, that is, that the facts disclosed in the record overcome the presumption in favor of the trial court's ruling on the point raised, to warrant this court in holding that the trial court's ruling did in fact deprive the appellant of a substantial right and hence entitled him to a reversal of such ruling. See *Oborn v. State,* 143 Wis. 249, 126 N. W. 737; *Parb v. State,* 143 Wis. 561, 128 N. W. 65; *Wiese v. Riley,* 146 Wis. 640, 132 N. W. 604.

Whether or not the trial court had the right to entertain the motion after the term, had to be determined under the provisions of sec. 2832, Stats. (1898), which provides that a court may within one year from notice thereof relieve a moving party from the judgment against him "through his mistake, inadvertence, surprise or excusable neglect." The trial court may, "in discretion," grant such relief. Obviously, the trial court in this case considered that the appellant was excusable for not moving during the term and that he had proceeded with due diligence to bring the matter to its attention. We cannot say that the court abused its discretion in this regard. *Kalckhoff v. Zoehrlaut,* 43 Wis. 373; *Robbins v. Kountz,* 44 Wis. 558.

An affidavit of advice of counsel is not required in moving under sec. 2832. *Bloor v. Smith,* 112 Wis. 340, 87 N. W. 870.

There is no showing in the record that the judgment appealed from was improperly awarded.

By the Court.—Judgment affirmed.

TIMLIN, J. I concur in the construction given to sec. 1816, Stats. (Laws of 1907, ch. 254). But I think a new trial should have been granted on account of misconduct of the jury. I am afraid of this case as a precedent on the latter point.

RATTLESNAKE DRAINAGE DISTRICT, Appellant, vs. KOSHKONONG MUD CREEK DRAINAGE DISTRICT, Respondent.

May 15—June 4, 1912.

Drains: Assessment by one drainage district against another: Validity: Presumption as to acts of commissioners: Parties: Appeal: Harmless errors.

1. Under the statute relating to drainage districts, and particularly sec. 1379—18, Stats. (Supp. 1906: Laws of 1905, ch. 419), one district has the right to make an assessment against another district to the extent of the benefits the latter will receive from the construction of the former's work.
2. It is not a valid objection to such an assessment that only a part of the land in the district assessed will be benefited by the other's work. It is for the commissioners of the district assessed to apportion the assessment against the lands therein according to law, and in reviewing such assessment it must be presumed they will perform this duty properly.
3. Under the statute the commissioners of a drainage district are public officers and a presumption is created in favor of the regularity and validity of their official acts, which must be overcome by the person who calls the same in question.
4. Proof that lands in one district were not properly or sufficiently drained and that its ditches had not sufficient outlet; that the ditches in a district subsequently organized were lower and relieved the ditches of the first district by furnishing an outlet, thereby keeping the ditches of the first district in such condition and repair as to furnish ample drainage for the whole district, is sufficient to support an assessment against such first district.
5. It is not essential to the validity of an assessment against a drainage district that the owners of land therein should be

made parties to the proceeding. The district is a body corporate and has sole identity independent of such landowners, and the assessment is against it as a legal entity, not against them.

6. Unfair attempts of counsel to get before the jury improper testimony, leading to the discussion of irrelevant matters, is not ground for reversal on appeal where, from the rulings of the trial court and the instructions given, it appears that no prejudicial error resulted.

APPEAL from orders of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an appeal from three separate orders raising substantially the same point, namely, the validity of assessment of benefits against the plaintiff district. One order directs the commissioners of the *Koshkonong Mud Creek Drainage District,* defendant, to amend their report and award costs in the sum of $176.28 against the plaintiff district; another denies a motion of the plaintiff, the *Rattlesnake Drainage District,* to set aside a verdict of the jury and strike out any assessment for benefits against the plaintiff district; and the third and final order confirms the amended report of the commissioners of the defendant.

F. W. Hall, attorney, and *E. T. Elver,* of counsel, for the appellant.

For the respondent there was a brief by *Buell & Lucas,* attorneys, and *J. A. Aylward,* of counsel, and oral argument by *Mr. F. W. Lucas* and *Mr. Aylward.*

KERWIN, J. Secs. 1379—11 to 1379—32*b,* Stats., as amended (Supp. 1906: Laws of 1905, ch. 419), provide for the organization of drainage districts. The plaintiff district was established under the provisions of these statutes in 1908. Its boundaries were fixed by order of the court, plans and specifications duly filed, and notice given to all landowners within the district and assessments for benefits which would accrue on account of the proposed work made against each

respective parcel of land. The second report of the commissioners was adopted and a final order of the court made confirming the same, from which order no appeal was taken.

Subsequent proceedings were taken under the statute to organize the defendant district, and such proceedings were had that on the 21st day of January, 1910, the commissioners of the defendant district filed in the circuit court for Dane county their report, in which report the sum of $15,000 was assessed against the plaintiff district as benefits. Afterwards and in February, 1910, a remonstrance was filed against said report on the ground that the assessment of benefits against the plaintiff district was too high and beyond the benefits conferred upon the plaintiff district or the land situate therein, and praying that an issue be framed, a jury impaneled and its verdict taken with respect to whether the assessment of benefits was too high, and for general relief. An issue was framed and a trial before a jury had, which resulted in a verdict finding that the benefits which will be derived by the plaintiff from the drainage provided to the land in its district by the ditches which the defendant proposes to construct will be $15,015.

Appellant complains of error in the following respects: The denial by the court of plaintiff's motions to change the answer of the jury from $15,015 to six cents and direct the commissioners of defendant to strike out from their report the assessment against the plaintiff, for the reason that the proposed work would affect only a portion of the plaintiff district; the refusal of the court to strike out the whole assessment on the ground that it was unconstitutional; error of the court in ordering the defendant to amend its report making the assessment against the plaintiff district $15,015 and adjudging costs against plaintiff; confirmation of the amended report of the defendant district; and the denial of a new trial.

1. The main contention of the appellant is that all the

lands in the plaintiff district are not benefited by the proposed work of the defendant district, and that only the first eight tiers of forties reckoned from the southern boundary of plaintiff district would be benefited by such construction; that there are about 2,600 acres of marsh land in the plaintiff district and only about 1,000 acres thereof will be benefited, and if the assessment stands the balance of the land in said district must pay its share of the assessment levied against the plaintiff and future assessments without receiving any benefit therefor. But the difficulty with this argument is that, as the court below held, we are not concerned in this proceeding with the apportionment of benefits upon the several tracts of land in the plaintiff district, but only the benefits which the plaintiff district as a whole will receive from the construction of the works by the defendant district. If the plaintiff district is benefited as a whole, then we cannot assume in the present proceeding that the plaintiff will not apportion such benefits and the assessments according to law, and that no parcel will be charged with assessment in excess of the benefits received.

Sec. 1379—18, Stats., as amended, provides that as soon as may be after confirmation of the preliminary report provided for in previous sections, or within such time as the court may direct, the commissioners shall proceed to have all necessary levels taken and surveys made and shall lay out the proposed work, make a map thereof, plans, profiles, and other specifications, and report in writing to the court certain things, among which are route, boundaries, assessment of damages, assessment of benefits, and cost of construction; and further provides that if any corporation would in the judgment of the commissioners derive special benefits from the whole or any part of the proposed work, the commissioners shall so report and assess those benefits and assess against the same its proportionate share of the cost of such proposed work; and that the word "corporation" shall include other drainage districts.

Sec. 1379—31*j* provides that the boundaries of the drainage district shall not conflict with any other drainage district above or below it, and if through the construction of any proposed ditch, drain, or levee increased cost shall be entailed upon the lower district in providing means to carry off the water or remove sediment flowing from the higher district, the lands in the higher district shall be liable for such increased cost. Sec. 1379—30, as amended, provides in effect that if in the first assessment for construction the commissioners shall have reported to the court a smaller sum than is needed to complete the work of construction, or if in any year an additional sum is necessary to pay interest, etc., further or additional assessments on the lands and corporations benefited proportioned on the last assessment of benefits which has been approved by the court shall be made by the commissioners under the order of the court or presiding judge without notice, which additional assessment may be made payable in instalments as specified in sec. 12, ch. 419, Laws of 1905, and shall be treated and collected in the same manner as the original assessment for construction confirmed by the court.

It is plain from these statutes that the right of defendant to assess against the plaintiff district to the extent of the benefits plaintiff receives from the construction of the defendant's work is provided by statute.

It also appears from the evidence that very thorough examination was made by the defendant through its engineers respecting extent of the benefits conferred upon the plaintiff by the construction of defendant's ditches, and evidence offered showing increase in value of the lands in the plaintiff district caused by the drainage system of the defendant. From all the evidence in the record it appears clearly that the verdict of the jury assessing benefits at $15,015 is well supported. There is credible evidence that the southern eight tiers of forties are benefited far beyond $15,015 and upwards of $27,000.

No claim is made that the plaintiff and defendant districts were not regularly organized. Sec. 1379—31*s*, as amended, provides that the commissioners of drainage districts are declared to be public officers and the presumption shall be in favor of the regularity and validity of their official acts; that whenever any report of the commissioners of any drainage district, or any part of such report, is contested, remonstrated against, or called in question, the burden of proof shall rest upon the contestant, remonstrant, or questioner.

The validity of our drainage laws has been frequently recognized by this court. *Donnelly v. Decker,* 58 Wis. 461, 17 N. W. 389; *State ex rel. Baltzell v. Stewart,* 74 Wis. 620, 43 N. W. 947; *Muskego v. Drainage Comm'rs,* 78 Wis. 40, 47 N. W. 11; *Stone v. Little Yellow D. Dist.* 118 Wis. 388, 95 N. W. 405; *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, 115 N. W. 825.

True, the costs, expenses, and damages assessed must not exceed the benefits. *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist., supra.* It does not appear in the instant case that the costs, expenses, and damages will exceed the benefits to the plaintiff district as a whole. But it is argued by appellant that some of the lands in the district are sufficiently drained and that such lands cannot be assessed for the benefit of undrained lands. It cannot be said, however, on this appeal that the plaintiff, when assessing property in its district to pay assessments made against it, will not apportion such assessment lawfully, nor can it be said that any land within the limits of the plaintiff district is not benefited by the works of the defendant. It appears from the evidence that the plaintiff's lands were not properly or sufficiently drained; that the ditches for want of sufficient outlet remained filled or partially filled with water, and that large deposits of silt accumulated in them; that the defendant district, lying adjacent to the plaintiff district, and its ditches, being lower than those of the plaint-

iff, relieve the ditches of plaintiff and furnish an outlet, thereby keeping the plaintiff's ditches in such condition and repair as to furnish ample drainage to the whole district.

Sec. 1379—23, as amended, provides that assessments for keeping drains, ditches, or other work in repair shall be due and payable on the first Tuesday of September annually; that the commissioners having charge of any completed drain, ditch, or other work shall, on the first Tuesday of June in each year, file with the clerk of the court having jurisdiction a report in which they shall specify the labor necessary to the preservation and protection of the work under their control and the sum to be assessed against each parcel, lot, easement, or corporation, and that no notice of the filing of such report shall be necessary; that all such assessments shall be apportioned on the last assessment of benefits confirmed by the court; that a hearing shall be had before the court or presiding judge, who shall examine the report, hear all objections, fix and determine the amount of such assessment, and cause such adjudication to be entered of record in court, and that the amount to be collected under the order of said court shall not in the aggregate amount in any one year to a sum greater than would be produced by the levy of thirty cents per acre on the lands benefited.

It appears from the evidence that the lands in the plaintiff district are materially enhanced in value by defendant's works. As before indicated, the plain meaning of the statutes on the subject is that all lands within a district shall pay assessments in proportion to the benefits received. Sec. 1379—18, as amended; *Sharp v. Eaton* (Ind.) 94 N. E. 753; *Culbertson v. Knight,* 152 Ind. 121, 52 N. E. 700.

The controlling question here is, To what extent is the plaintiff district benefited? and that question has been answered by the jury upon sufficient evidence. How the plaintiff is to distribute assessments upon the lands in its district or how such assessments shall be collected is not before us. No doubt the law will be found sufficient to carry out the drain-

age scheme contemplated by the statutes. Secs. 1379—31, 1379—31*a*, 1379—30*e*, 1379—31*om*, and other statutes on the subject.

Even if it be true that any particular parcel or parcels of land in the plaintiff district should not be benefited by the defendant's improvement, it does not follow that the assessment of benefits against the whole district is unconstitutional, since it is established that the district as a whole is in fact benefited in the amount found by the jury and the assessments must be levied according to benefits. The finding of the jury does not fix the assessment as to each separate parcel of land in the plaintiff district. The effect of the finding is to form a basis for the commissioners of the plaintiff district to make an additional assessment for construction of work which must be done before its district will be properly drained. There is nothing in the record showing or tending to show but that the plaintiff district was organized according to the statutes, and that such statutes have been fully complied with in fixing assessments of benefits within the plaintiff district, and the proceedings here in no way affect such assessments or the rule of apportionment of such assessments according to benefits, and no property right of any individual landowner in the plaintiff district is invaded, unless the total cost of construction that shall be assessed against his land exceeds the benefits conferred by the drainage.

Appellant relies upon *Lathrop v. Racine,* 119 Wis. 461, 97 N. W. 192; *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, 115 N. W. 825; and *Remington D. Dist.: Appeal of Chandos,* 138 Wis. 621, 120 N. W. 523. An examination of these cases will show that they do not apply to the situation before us.

It is also contended that the owners of the land within the plaintiff district should have been made parties. This, under the statutes referred to, is not necessary, since the assessment is not against the landowners, but against the plaintiff dis-

trict. The plaintiff is a corporation and has sole identity independent of the landowners within the district. It is a body corporate, with the right to sue and be sued and have perpetual succession. *Chicago, M. & St. P. R. Co. v. Lemonweir River D. Dist.* 135 Wis. 228, 115 N. W. 825.

Counsel for appellant also allege error on account of what they term an unfair attempt of defendant's attorneys to get before the jury improper testimony seriously impairing plaintiff's rights. An examination of the record shows that counsel did make some effort to get in testimony which was not properly admissible, in consequence of which some discussion was had upon irrelevant matters. But in view of the rulings of the court and the instructions given we are satisfied that no prejudicial error resulted. Upon the whole record we are convinced that the orders appealed from are right and should be affirmed.

By the Court.—The orders appealed from are affirmed.

SENTINEL COMPANY, Respondent, vs. SMITH, Appellant.

May 15—June 4, 1912.

Guaranty: Oral evidence affecting writing: Ambiguity: Notice of default: Discharge of guarantor.

1. Evidence of conversations prior to the signing of a written contract, with reference to the meaning thereof, is not admissible to show an understanding between the parties contrary to the unambiguous terms of the contract.
2. Where a guaranty is of payment, not of collection, failure to give notice of a default or to demand payment promptly does not discharge the guarantor, in the absence of any connivance or gross negligence amounting to a fraud upon him.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This action was brought on a guaranty which is found in the report of this case in 143 Wis. 377, 127 N. W. 943. The defenses interposed were (1) that plaintiff never accepted the defendant as surety; (2) that there was a verbal understanding between the parties, at and prior to the signing of the contract, to the effect that the liability of the surety should extend only to the first $500 worth of papers furnished to the agent, Hull; and (3) that the plaintiff failed to seasonably notify the defendant of Hull's default, by reason of which failure defendant was discharged from liability. The case was submitted to the jury on a special verdict containing two questions. By their answer to the first question the jury found that plaintiff notified the defendant on February 25, 1908, that it accepted his guaranty of the contract. By their answer to the second question the jury found that the defendant knew within a reasonable time after the guaranty was signed that the plaintiff was furnishing papers to the agent, Hull, on the faith of the guaranty. Judgment was awarded to plaintiff on this verdict, and from such judgment the defendant appeals.

J. Burritt Smith, for the appellant.

For the respondent there was a brief by *Olin, Butler & Curkeet,* and oral argument by *J. M. Olin.*

BARNES, J. This case was before the court on an appeal from an order overruling a demurrer to the complaint, and is reported in 143 Wis. 377, 127 N. W. 943. The errors assigned on this appeal are refusal of the court to grant a nonsuit or direct a verdict, improper admission and exclusion of evidence, and refusal to submit to the jury a question requested by plaintiff.

It is argued that the court should have granted a nonsuit, and, failing in this, should have directed a verdict because the evidence did not show that plaintiff ever accepted the defendant as surety. The jury had a perfect right to believe

the evidence of the plaintiff's agent, and it was ample to show that he had authority to accept the defendant as surety and that he did so.

The defendant sought to prove that prior to the signing of the guaranty he had a conversation with plaintiff's agent in reference to its meaning and that it was understood between them that liability would cease when Hull had purchased and paid for $500 worth of papers. This evidence was excluded and its exclusion is assigned as error. The ruling was correct. The court held in effect on the former appeal that the contract involved was unambiguous and that it was a continuing guaranty. This holding was the law of the case. If testimony such as was offered could be received in any case, it would not be receivable for the purpose of importing ambiguity into an otherwise unambiguous contract, but for the purpose of ascertaining the meaning of a contract which was ambiguous on its face or became ambiguous when applied to the subject with reference to which the parties contracted. *Klueter v. Joseph Schlitz B. Co.* 143 Wis. 347, 128 N. W. 43; *Pedelty v. Wis. Z. Co.* 148 Wis. 245, 134 N. W. 356.

Some other errors on the admission and exclusion of evidence are assigned, but they are not of sufficient importance to invite discussion.

The appellant also urges that the court erred in refusing to submit the following question to the jury: "Did the plaintiff, within a reasonable time after any default under the contract by Mr. Hull, notify the defendant of such default?" We think the court correctly refused to submit this question, because there was no evidence in the case which warranted its submission. The contract was a guaranty of payment and not of collection. *Loverin & B. Co. v. Travis,* 135 Wis. 322, 115 N. W. 829. This court held in the former opinion that mere neglect on the part of the principal to promptly demand payment when the default occurred would not discharge the

surety. There must be some act of connivance or gross negligence practically amounting to a fraud on the surety in order to work his discharge. See opinion on former appeal, 143 Wis. 380. The record is barren of any evidence from which even an inference of fraud could be drawn.

By the Court.—Judgment affirmed.

WILLARD, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 16—June 4, 1912.

Railroads: Negligence: Gross negligence: Injury to horses in car: Contract limiting liability: Agreed valuation: Damages: Principal and agent: Authority of drover to act for shipper.

1. In order to constitute gross negligence there must be either a wilful intent to injure, or that reckless and wanton disregard of the rights and safety of another or of his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure. The element of inadvertence must be wanting.
2. Evidence that horses shipped by plaintiff on the defendant's railway were placed in a box car which was switched upon a sidetrack, and that thereafter another car was pushed in upon such track and against the car containing the horses with sufficient violence to cause it to collide with a third car standing a few feet away, breaking the halters of the horses and throwing them down or upon their haunches, does not show gross negligence on the part of defendant, there being nothing to show that the manner of switching the second car and the consequences thereof were not the result either of pure accident or of that inadvertence which amounts to ordinary negligence only. The question of gross negligence should, therefore, not have been submitted to the jury.
3. It is competent for a shipper and a railway company to agree upon a valuation in case of injury, in consideration for which

agreement the railroad company accepts a lower rate of freight than it would otherwise be entitled to; and in such case a recovery by the shipper for an injury resulting from ordinary negligence should be limited to the amount agreed upon.

4. In the absence of evidence to the contrary, a drover in charge of a shipment of horses has authority to enter into a contract fixing the value of the animals shipped and limiting the maximum liability of the carrier to such valuation.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Reversed.*

Action to recover damages for injuries to horses in shipment. The complaint alleged that on or about the 15th day of June, 1910, the defendant railway company, as common carrier, received three race horses of the plaintiff at Reedsburg, Wisconsin, for shipment to Austin, Minnesota; that defendant, in violation of its duties, negligently injured said horses, to plaintiff's damage in the sum of $1,500. The complaint contained two counts, one charging ordinary negligence and one charging gross negligence. The answer of the defendant contained a general denial and, as a separate defense, alleged that it agreed to receive and transport said horses "under and in pursuance and by virtue of a written contract, in and by which contract the value of the horses mentioned in plaintiff's complaint is declared and agreed to be not more than $100 each; that in and by said contract the liability of the defendant was in any event limited to said declared valuation of $100; that defendant's tariffs, schedules, and classifications relating to such shipments and the conditions and limitations therein contained were, at and prior to the time said shipment was made, duly made and had been duly filed as required by law, and of the same the plaintiff had due notice; that in and by said tariffs, schedules, and classifications it was provided that the rate or tariff for shipping horses declared to be of the value of $100 should be sixty cents per hundred pounds, the minimum weight of the animal to be 2,000 pounds; that where the declared value

exceeded $100, an addition of twenty-five per cent. should be made to the rate per hundred pounds; that in and by said tariffs, schedules, and classifications it was further provided that animals exceeding in value $800 per head, or when no value was given, would be taken only by special arrangement; that plaintiff's horses were shipped at the rate provided in and by said tariffs, schedules, and classifications where the declared value was not in excess of $100, all of which plaintiff knew;" and demanded judgment that the action be dismissed.

The jury, by special verdict, negatived the charge of ordinary negligence, found the defendant guilty of gross negligence, and assessed plaintiff's damages in the sum of $1,250.

The defendant moved for judgment upon the merits and undisputed evidence notwithstanding the special verdict; for an order setting aside the special verdict and for judgment upon the undisputed evidence; for an order changing the answer to the second question of the special verdict from Yes to No, and for judgment upon the special verdict as thus changed; in the event of the denial of those motions, for an order setting aside the special verdict and for a new trial, upon the usual grounds: all of which alternative motions were denied, and judgment rendered for the plaintiff on the special verdict, from which judgment the defendant appealed.

For the appellant there was a brief by *William G. Wheeler,* attorney, and *Edward M. Smart,* of counsel, and oral argument by *Mr. Smart.*

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

VINJE, J. The main question presented for review in this case is, Did the court err in holding that there was any evidence to establish gross negligence on the part of the defendant? It appears that the plaintiff and his drover, Mills, took three horses to the depot at Reedsburg, Wisconsin, about

8 o'clock in the morning and loaded them into an ordinary box car on one of the sidetracks of the defendant company. No claim is made that the horses were not properly loaded. The car remained on the sidetrack until about 4 o'clock in the afternoon, when it was picked up by one of defendant's train crews and switched onto another track and left at a point about a few feet from another box car. Sometime thereafter the train crew pushed another car onto the track and against the car containing the horses with sufficient violence to injure the horse in question (named Sable Girl). It also appears that one of the other two horses received a slight injury and the third horse received some injuries, the precise nature of which is not disclosed by the testimony in this case. Only two witnesses testified as to how the injury occurred. These witnesses are the drover, Mills, who remained in the car with the horses, and Roy Mepham, who witnessed the accident while sitting on a platform about twenty-five paces from the car. The substance of the testimony of Mills as to how the injury occurred is as follows:

"The horses were loaded about 8 o'clock in the morning and the company picked them up about 4 o'clock in the afternoon. They came along and picked me up and put me on the sidetrack, then they went back and got a heavy furniture car and threw it back against me on this sidetrack, and when it struck it struck another car behind a little ways from me and threw the horses down. I couldn't say it was a furniture car, it was a box car. When it struck I was with the horses, holding this mare. I was in front of them. It threw them back and broke the halter rope, and then when it went back against this other car with such force that it threw them back in the car. Sable Girl went back on her haunches in the corner of the car. I judge it would be about nine feet back to the end of the car, about half of the car. She landed right on her haunches in the corner. I got them standing up and fixed something to tie them up again. I saw the furniture car coming and I went back and took hold of her head. I stood in the doorway. The car Sable Girl

and the other horses were in was a box car. I couldn't tell how fast the furniture car was coming. It was coming endways right towards me from the west. There was another car to the east of our car, which, when our car was struck, our car moved into. They were just a few feet apart. She was thrown into the corner when our car struck the car to the east of me. The car struck the furniture car pretty hard. I continued in the car from there to Austin. I never left the car. That was the only jolt that I had anywhere. I took the horses out of the car at Austin, Sable Girl among them. When the furniture car struck our car, Donna Mack's halter broke. One of the other two horses was thrown down, Donna Mack. Donna Mack is a mare. She was thrown in the end of the car with this other mare."

The witness Mepham testified:

"I saw the collision Mr. Mills spoke about. This car, when the horses were loaded into it, was back of the house. There are two tracks at Reedsburg on that side, besides the main track. One the house track, and one the team track. This car was on the house track back of the freight house. It was taken from there on to the team track. I saw the collision while sitting on the high platform, probably about twenty-five paces from the car."

"*Q.* What did you notice when the car with the horses was struck? *A.* Why, I noticed it hit pretty hard."

"The middle of the car seemed to me to sort of raise some. I heard quite a scrambling in the car. I went over when the fellow yelled. He was holding the horses and he told me to get the boys, that the halter straps were broken, hollered for the boys."

This is all the testimony in the case as to the movements of the car upon which the verdict of gross negligence is based. The question is, Does such evidence sustain a finding of gross negligence? Plaintiff maintains that it does, and cites cases from other jurisdictions to sustain the claim; notably, the cases of *Chicago & N. W. R. Co. v. Calumet S. Farm,* 194 Ill. 9, 61 N. E. 1095; *Chicago & A. R. Co. v. Grimes,* 71 Ill. App. 397; and *Brockway v. Am. Exp. Co.* 168 Mass.

257, 47 N. E. 87. As pointed out in *Lockwood v. Belle City St. R. Co.* 92 Wis. 97, 112, 65 N. W. 866, and *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663, our court has adopted a classification of negligence differing materially from that of many other courts, hence citations from other jurisdictions may not be of much value in determining what constitutes gross negligence in our state. This is especially true of cases from Illinois, where materially different classifications and definitions of negligence obtain. It is the settled law of this state that in order to constitute gross negligence there must be either a wilful intent to injure, or that reckless and wanton disregard of the rights and safety of another or of his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure. The element of inadvertence must be wanting. *Lockwood v. Belle City St. R. Co.* 92 Wis. 97, 65 N. W. 866; *Schug v. C., M. & St. P. R. Co.* 102 Wis. 515, 523, 78 N. W. 1090; *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446; *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *Decker v. McSorley,* 116 Wis. 643, 93 N. W. 808; *Wilson v. Chippewa Valley E. R. Co.* 120 Wis. 636, 98 N. W. 536; *Gould v. Merrill R. & L. Co.* 139 Wis. 433, 121 N. W. 161; *Astin v. C., M. & St. P. R. Co.* 143 Wis. 477, 128 N. W. 265; *Henke v. Milwaukee E. R. & L. Co.* 147 Wis. 661, 133 N. W. 1107.

In the present case there is no evidence of an actual, wilful intent to injure plaintiff's property. It is not shown that the engineer or the switchmen engaged in moving the car knew that there were horses in the stationary car on the siding. Neither is there any evidence of that recklessness, wantonness, or rashness necessary to constitute what the law calls an intent to injure. The manner of switching the car and the consequences thereof, so far as the evidence discloses, were the result of either pure accident or of that inadvertence which amounts to nothing more than ordinary negligence.

Where a plaintiff charges gross negligence and the injury is one that might under the circumstances be the result of mere inadvertence, it is necessary, to sustain the charge, to have some evidence to take the injury out of the field of ordinary negligence. The burden is upon the plaintiff to show gross negligence, and such burden is not met by showing facts and circumstances amounting at most to only ordinary negligence. A failure to transmit or receive a signal at the proper time; a misunderstanding of signals; an error in judgment as to the distance between the moving and the stationary car, or as to the speed of the moving car; a slight defect in the brakes operated by the engineer, or a number of other causes attributable either to accident or inadvertence, would completely account for what happened. It is a matter of common knowledge that it does not require such a very great impact of cars to cause horses tied therein to break loose and fall down or back upon their haunches. Such results are of almost daily occurrence, due to accident or ordinary negligence. That being the case, a plaintiff charging gross negligence must show that the result was due to such negligence; that it was not produced by mere inadvertence. Both witnesses for the plaintiff characterize the impact as being "pretty hard,"—surely not very expressive language to denote gross negligence. The decision, however, should not turn upon the mere language used by witnesses. Nor has it in this case. We refer to the language simply to emphasize the fact that it accords with the rest of the proof, which shows, at best, only ordinary negligence. The trial court should not have submitted the issue of gross negligence to the jury upon the proof before it.

Respondent contends that even if gross negligence is not shown, the defendant could make no valid contract to limit its liability not to exceed the agreed maximum valuation,—in this case $100 per horse,—as such contract was clearly an effort to limit liability and not to agree upon a valuation,

and cites *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485, 58 N. W. 780. The contract in the case at bar provides:

"It is agreed between the owner and shipper of these animals and the said railroad company that in case of accident resulting in injury to said animals the value thereof shall in no case exceed the valuations named above."

The valuation named for each horse was $100. The proof shows that the horses were shipped at a reduced rate by reason of the provisions of the stock contract fixing the valuations therein named. The case of *Ullman v. C. & N. W. R. Co.* 112 Wis. 150, 88 N. W. 41, is decisive of respondent's contention. It was there held that it was competent for a shipper and a railway company to agree upon a valuation in case of injury in consideration for which agreement the railroad company accepts a lower rate of freight than it would otherwise have been entitled to, and that such an agreement was not one which exempted a railroad company from negligence, but was an agreement in advance of the maximum measure of damage to which the shipper should be entitled in case of an accident coming within the terms of the contract.

In the case of *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485, 58 N. W. 780, there was a mere limitation of maximum liability without reference to the value of the property at all. The distinction between such a situation and the facts in the *Ullman Case* was clearly pointed out by the court in the latter, and it was there held that a contract liquidating loss or damage in advance upon an actual or maximum value basis agreed upon and stated therein, was valid. See, also, *Donlon v. Southern Pac. Co.* 151 Cal. 763, 91 Pac. 603, 11 L. R. A. N. S. 811, and *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 5 Sup. Ct. 151.

It is also claimed that no valid stock contract was made because Mills, the drover, had no authority to sign for plaintiff. It appears that as soon as the loading was done plaintiff left the horses in charge of Mills without having received any

bill of lading or stock contract or made any arrangement with the railway company. He left Mills to attend to that. Plaintiff's testimony on this subject is as follows:

"They were shipped in my name by me. I can't say whether I represented myself or whether my man did. The man's name was Mills. It was either Mills or me. . . . I couldn't say as to a stock contract. He must have had one, but I don't think he gave it to me. I have frequently shipped horses and always got a live-stock contract, also a bill of lading. I can't say sure whether I got a stock contract and bill of lading, or Mr. Mills got it."

In view of this testimony it is clear that plaintiff expected that Mills would attend to the shipping of the horses for him and would get a stock contract and bill of lading, and that he authorized him to do so in his behalf. In the absence of evidence to the contrary, a drover in charge of a shipment has authority to stipulate and to enter into a contract fixing the value of the animals shipped and limiting the maximum liability of the carrier to such valuation. *Squire v. N. Y. C. R. Co.* 98 Mass. 239; *Armstrong v. C., M. & St. P. R. Co.* 53 Minn. 183, 54 N. W. 1059. Mills was the only person with whom the defendant came in contact and with whom any arrangement was made for the shipping of the horses. He was in charge of them and, for the purpose of shipment, stood in the position of an owner. This would be so in the absence of any evidence to show that plaintiff put him in charge of the property, and is especially so where, as here, the owner expected him to receive a stock contract and bill of lading. Plaintiff's own testimony clearly shows that he delegated to Mills authority to sign the stock contract and receive the bill of lading.

The defendant admits liability in the sum of $100, the stipulated value of the horses in the stock contract. The judgment of the trial court is reversed, and the cause remanded with directions to enter judgment in favor of the plaintiff for the sum of $100.

By the Court.—It is so ordered.

BANK OF BARABOO, Respondent, vs. LAIRD, Appellant.

May 16—June 4, 1912.

Bills and notes: Owner in due course: Notice to maker.

The rights of a bank as owner in due course of a note purchased by it are not prejudiced by the sending of a notice to the maker stating that the note is at the bank "for collection."

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

V. H. Cady, for the appellant.

For the respondent there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *E. A. Evans.*

WINSLOW, C. J. The action is upon a negotiable promissory note executed by the defendant to a corporation called the Great Lakes Portland Cement Company, which note was afterwards purchased by the plaintiff. The defense was that the execution of the note was induced by fraud, and that the plaintiff did not become the owner thereof in due course.

Upon the trial it appeared that the note was a three-months note executed and dated October 10, 1910, and the plaintiff's cashier testified that the same was purchased by the bank from the agent of the promisee in the regular course of business on the 18th of October for the face thereof, less a discount of seven per cent. for the time it had to run. There was nothing in the case tending to contradict or throw any serious doubt on this testimony unless it be the fact that when the note fell due the bank sent a notice to the maker stating that the note in question was at the bank "for collection," instead of stating that the bank owned the note. Testimony by the defendant to the effect that the assistant cashier of the bank made an oral request of the defendant to pay the note, in the course of which he stated that the same was at the bank "for collection," was ruled out, and a verdict for the plaintiff for the full amount of the note, principal and interest, was directed. Certain testimony tending to prove certain of the

alleged fraudulent representations was received, but the court held that the testimony showed without dispute that the plaintiff was the owner in due course for value, and on this ground directed the verdict.

The ruling of the trial court was manifestly right. The note was bought over the counter of the bank in regular business hours at the ordinary rate of discount, and there was nothing in its appearance to indicate that it was anything more or less than an ordinary negotiable note given by a business man in the ordinary course of his business. The fact that the bank notified the maker that the note was at the bank "for collection" cuts no figure. We suppose that such notices are sent out by all banks whether they own the particular note in question or not. They are not inconsistent with ownership by the bank. There might perhaps be special circumstances surrounding a given case where such a notice or statement might acquire the significance of an admission that the bank was not the owner, but there are no such facts here.

By the Court.—Judgment affirmed.

BOARD OF TRUSTEES OF LAWRENCE UNIVERSITY, Appellant, vs. OUTAGAMIE COUNTY, Respondent.

May 16—June 4, 1912.

Constitutional law: Statutes: Taxation: Powers of legislature: Uniformity in rule: Exemptions: Classification: Practical construction.

1. **A law ought not to be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt, and the court should point out the particular part of the constitution which is violated.**
2. **Unless restrained by constitutional provisions, the state legislature has full power to exempt any person or corporation or**

class of property from taxation according to its views of public policy or expediency.

3. Under sec. 1, art. VIII, Const., providing "that the rule of taxation shall be uniform," statutory exemption from taxation must be based upon a legal classification.

4. The rule of uniformity does not relate alone to the rate or percentage of taxation; and it may be as effectively abrogated by arbitrary exemption from taxation as by arbitrary impositions of unequal amount.

5. The rule of uniformity is violated by a statute giving an arbitrary exemption greater than is given to other persons of the same class owning property of the same general description.

6. The legislature having, by sec. 1038, Stats., created a class consisting of chartered colleges or universities and prescribed exemptions for that class, a subsequent statute (Laws of 1901, ch. 116) giving to one member of that class by name an additional exemption based on no distinctive feature of the person receiving it or the property exempted, was invalid.

7. The rule of practical construction—that the uninterrupted practice of the government prevailing through a long series of years and the acquiescence of all its departments settle a constitutional interpretation in accordance with such long continued practice—has no application where there has been no such acquiescence on the part of the judicial department, nor where in the application of the constitutional provision in question there can be no doubt, ambiguity, or uncertainty.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

The appeal is from a judgment dismissing the plaintiff's complaint with costs.

For the appellant the cause was submitted on the brief of *Nash & Nash.*

For the respondent there was a brief by *Francis J. Rooney* and *H. C. Sloan,* and oral argument by *Mr. Rooney.*

TIMLIN, J. The plaintiff is an educational corporation created by the territorial legislature of Wisconsin in the year 1847. By ch. 116, Laws of 1901, the plaintiff's charter was amended in several respects, and by sec. 8 of this act its board

of trustees was authorized to "hold free of taxation any lands or other property acquired by donation, bequest, or purchase and held expressly for educational purposes, and for the endowment of the institution." At the time of the enactment of the statute last mentioned there existed and was in force in this state sec. 1038, Stats. (1898), which related to property exempt from taxation, and among other things provided the following:

"Personal property owned by any religious, scientific, literary or benevolent association, used exclusively for the purposes of such association, and the real property, if not leased or not otherwise used for pecuniary profit, necessary for the location and convenience of the buildings of such association and embracing the same, not exceeding ten acres; and the lands reserved for grounds of a chartered college or university, not exceeding forty acres."

An incorporated school is a scientific or a literary association within the meaning of this statute. *St. John's M. Academy v. Edwards,* 143 Wis. 551, 128 N. W. 113.

Notwithstanding the exemption provided by said ch. 116 and claiming that that part of the statute was unconstitutional, the taxing officers in 1908 assessed certain city real estate of the plaintiff for general taxes. The plaintiff paid these taxes under protest and brought this action in the regular way by appeal from the county board of supervisors to recover the sum so paid. The controlling question in the case is whether or not that part of the act of 1901 above quoted is valid and constitutional.

It is conceded that a law ought not to be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt, and the court should be able to point out the particular part of the constitution which is violated. It is further conceded that, unless restrained by constitutional provisions, the state legislature has full power to exempt any person or corporation or class of property from taxation according to its views of public policy or expediency.

Cooley, Const. Lim. (3d ed.) 127; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833.

Sec. 1 of art. VIII of the state constitution reads: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." This section has been the subject of much litigation and much discussion in this court. In *Black v. State,* 113 Wis. 205, 89 N. W. 522, this court was confronted with a statute which imposed an inheritance tax upon estates of the value of $10,000 or upwards. Estates below this value were exempt. A fair summary of one of the points decided in that case may be found in the third paragraph of the syllabus, as follows:

"Under sec. 1, art. VIII, Const., providing that the rule of taxation shall be uniform; and under the equality in the protection of the laws guaranteed by sec. 1, art. I, Const., and the XIVth amendment to the federal constitution, a classification of persons or property liable to or exempt from taxation does not violate the required rule of uniformity and equality, provided such classification be founded on real differences, affording rational grounds of distinction, and the exemption be reasonable in amount."

The decision, it will be observed, does not put the invalidity of the statute solely or squarely upon its conflict with sec. 1, art. VIII, Const., but recognizes such conflict and finds the statute avoided by this and other constitutional provisions.

In *Battles v. Doll,* 113 Wis. 357, 89 N. W. 187, a statute exempting villages from certain taxes was before this court for construction, and the court said among other things:

"This exemption has a just and equitable basis to rest upon, and will be sustained, unless the class of cities and villages to which it is made to apply is such as cannot be justified under a proper construction of the constitution. From the very nature of things, any classification made must, to a greater or less extent, be arbitrary. The grounds upon which such classification must rest were stated in *Johnson v. Mil-*

waukee, 88 Wis. 383, 60 N. W. 270, and reaffirmed in *Boyd v. Milwaukee,* 92 Wis. 456, 66 N. W. 603, and *Adams v. Beloit,* 105 Wis. 363, 81 N. W. 869. We need not repeat what was said in those cases. The general doctrine is that the classification must be appropriate, and not artificial."

These and other observations in that opinion plainly indicate that this court was then of the opinion that classification was essential to the validity of exemptions under some circumstances.

In *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468, it was decided that exemptions from the provisions of a law requiring peddlers to obtain a tax license must be based on some legitimate classification germane to the purpose of the law or else the law is invalid. This because it denied the equal protection of the laws. Whether it was invalid under sec. 1, art. VIII, was mooted but not decided. Legal classification was held to be a requisite, but the statute failed because of its conflict with other provisions of the constitution. It is said, however, that the question whether or not such unclassified and arbitrary exemptions conflicted with sec. 1 of art. VIII of the state constitution was one not yet authoritatively decided.

In *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 642, 643, 108 N. W. 557, the court said:

"Under our constitution, it must be remembered, there is the amplest power on the part of the legislature to exempt an entire class of property from taxation, and to make such class very narrow, even excluding from the benefits accorded to the members thereof those owning property of the same general class, so long as the character of that owned by those of the subclass is so far different from that owned by others, as, within the boundaries of reason at least, to suggest necessity or propriety, having regard to the public good and the constitutional object to be attained, and limitations in respect thereto, of substantially different legislative treatment. Few cases that can be found have gone further on that line than *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833.

There, as we have seen, a very small subclass of real estate, a class so small as to be confined to one owner, was deemed sufficiently different from realty generally to warrant the legislature in exempting it from taxation. It is not likely, as we have before indicated, that this court will soon go further on that line than it did in that case."

Here we have, I think, an express and authoritative recognition of the necessity for classification in making exemptions.

In *State ex rel. Sanderson v. Mann,* 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, we find Mr. Justice CASSODAY, who wrote the majority opinion in *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 8 N. W. 833, earnestly, almost vigorously, protesting against any interpretation of the opinion in the last mentioned case which would authorize exemption except upon some principle of classification or which would authorize arbitrary exemptions. This, as we understand it, expressly recognizes that classification is necessary, although the classification is a very liberal one.

When we are presented with a case in which the exemption is arbitrary and in which other persons of the same class owning property of the same general description are awarded exemptions of a lesser amount, the situation is one in which the rule of uniformity is violated. It is impossible under the most liberal rule of classification to sustain it as a classification, because the class is already made and the situation is one in which a different amount of exemptions is allowed to one person of the class than to others of the same class. For example: in subd. 11, sec. 1038, there is an exemption from taxation of wearing apparel, family portraits, etc., not exceeding in value $200, and kitchen and other household furniture not exceeding in value $200. Here the class is determined by description of the property exempted. The rule of uniformity would be destroyed by an additional provision that certain persons of the same class should have $800 ex-

emptions of this class of property. So where the class consists of the property of certain described persons as religious, scientific, literary, or benevolent associations except one or more, naming them. The legislature had, by sec. 1038, for the purpose of providing exemptions, created a class consisting of chartered colleges or universities and prescribed the exemptions for that class. Aside from the act of 1901 the plaintiff is entitled to all the exemptions of that class found in sec. 1038. Plaintiff unquestionably belongs to the class entitled to these exemptions. There is, as we view it, by the act of 1901 conferred upon the plaintiff arbitrarily and not as a class an additional exemption from taxation, based on no distinctive feature of the person receiving the exemption or the property exempted. It is very plain that the rule of uniformity mentioned in the constitution does not relate alone to the rate or percentage of taxation. It is equally obvious that the rule of uniformity may be as effectually abrogated by arbitrary exemptions from taxation as by arbitrary impositions of unequal amount. The words of the constitution, while recognizing the power of the legislature to designate the property upon which taxes shall be laid, limit this power in some degree by the requirement that the rule of taxation shall be uniform. The section of the constitution mentioned must stand in its full integrity, and the designation of property to be taxed is to be exercised in obedience to the command that the rule of taxation shall be uniform. The authorities hereinbefore cited sufficiently show that this court has endeavored in the past to adhere to this construction of the statute, recognizing, however, in the legislature a broader power of classification for the purpose of designating what property shall be taxed than is ordinarily possessed in relation to other subjects requiring classification.

The appellant cites numerous instances from 1855 to 1911 in which the legislature of Wisconsin has by private and local act or general statute exempted from taxation certain de-

scribed property of a designated corporation or association. It is thence argued that the Wisconsin legislature has from a very early day placed such construction upon sec. 1 of art. VIII of the state constitution as to permit it to exercise this power notwithstanding that constitutional provision. The case of *Dean v. Borchsenius,* 30 Wis. 236, and other like cases are invoked in support of the rule that the uninterrupted practice of the government prevailing through a long series of years and the acquiescence of all its departments settle a constitutional interpretation in accordance with such long continued practice. The principle, which we recognize, is not, however, controlling in the instant case (1) because, as it appears from the citations given, there was no such acquiescence on the part of the judicial department of the state; (2) few of the instances brought forward support the conclusion. The list starts out with the private and local law of 1855 (ch. 82) incorporating the Hesperian Society of the University of Wisconsin and exempting from taxation its personal property and the real estate actually occupied by it for the purposes for which it was incorporated. If there were no other members of that class, or if property used for the purposes of the Hesperian Society constituted a class; or, in other words, was unique and distinct in its uses or purposes from any other property in the state of Wisconsin, the act would be of undoubted validity and no precedent for the interpretation sought to be placed by appellant upon the section of the constitution in question. Ch. 104 of the Private and Local Laws of 1855, which incorporates the Columbus Collegiate Institute and exempts from taxation its library, apparatus, cabinet, and lands not exceeding ten acres, is next cited. This is not materially different from subd. 3 of sec. 1038, Stats. (1898), and is not entitled to the interpretive weight given it by the appellant. The same is true of ch. 516, P. & L. Laws of 1856; ch. 282, P. & L. Laws of 1867; ch. 334, P. & L. Laws of 1863; ch. 382, P. & L. Laws of

1870, etc. The considerations mentioned with reference to ch. 82, P. & L. Laws of 1855, also apply to the instances covered by ch. 203, Laws of 1861; ch. 441, Laws of 1865; ch. 68, Laws of 1866; ch. 59, P. & L. Laws of 1869; and ch. 324, P. & L. Laws of 1870. In the large list of acts mentioned there are instances in which the exemption is arbitrary. But, as we have seen, these instances occurred in the legislative branch of the government, while this court has been declaring the opposite rule. Many of the acts mentioned were passed at a time when the corporations or associations whose property was exempted were the first or only one of that kind existing in the state, and before the state legislature had by general act classified exemptions from taxation so as to bring such corporation or association into a class. Those instances cited which show a clear violation on the part of the legislature of sec. 1 of art. VIII of the state constitution, going to destroy the requirement of uniformity by arbitrary exemptions, prove too much.

"The rule, that practical construction of a law will be regarded by the court as controlling after long acquiescence, is invoked. That rule is familiar, and that it may apply where a constitutional question is involved. *Dean v. Borchsenius,* 30 Wis. 236. But it has no application to a legislative enactment which, in neither its literal sense nor its application to the subject it affects, is ambiguous. In such a case there is no room for the operation of the rule of practical construction, or any other. The act must be taken to mean what its language obviously indicates, regardless of the length of time that a contrary view has obtained. *Travelers' Ins. Co. v. Fricke,* 94 Wis. 258, 265, 68 N. W. 958." *Milwaukee Co. v. Isenring,* 109 Wis. 9, 27, 85 N. W. 131.

Turning to the case last mentioned in the above quotation we find it there stated:

"The doctrine of practical construction of a doubtful statute is well understood, and it has been recognized and acted upon by this court. *Scanlan v. Childs,* 33 Wis. 663; *State ex*

rel. Hudd v. Timme, 54 Wis. 318, 11 N. W. 785. It is an absolute requisite, however, in the application of the doctrine, that the law so construed must be doubtful, ambiguous, or uncertain. It can have no force against plain language. 'A customary violation of the plain language of the law gives no authority for continuing such violation.' *State ex rel. Raymer v. Cunningham,* 82 Wis. 39, 50, 51 N. W. 1133; Sutherland, Stat. Const. § 308; *State ex rel. Weiss v. District Board,* 76 Wis. 177, 44 N. W. 967."

"Acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it." Cooley, Const. Lim. (7th ed.) ch. 4, pp. 106, 107.

In the application of this section of the constitution to some cases there may arise doubt or ambiguity. But I think not with reference to the case here before the court, where at and prior to the passage of the exemption law the class to which the corporation belongs and in which it is included is fixed by the legislature and provided with a definite exemption of property from taxation. The new statute giving this particular corporation *eo nomine* a further and additional exemption of the same general class of property plainly contravenes the rule of uniformity of taxation required by the constitution, and is for that reason invalid. It follows that the judgment appealed from must be affirmed.

By the Court.—Judgment affirmed.

MARSHALL, J., took no part.

STUTZMAN, Respondent, vs. CICERO MUTUAL FIRE INSURANCE COMPANY, Appellant.

May 16—June 4, 1912.

Fire insurance: Mutual companies: Assessments: Default in payment: Unliquidated demand against company: Suspension of policy: Tender of assessment after loss: Waiver: Proofs of loss.

1. An unliquidated and disputed claim by a policy-holder against an insurance company does not justify refusal to pay an assessment, nor relieve him from the penalty of default.
2. A provision in the by-laws of a mutual fire insurance company that no person shall receive any benefit or advantage from the company under or by virtue of a policy until all assessments are fully paid, is a valid condition, is self-executing, and requires no affirmative action on the part of the company to make it effective.
3. The words "any benefit" in such by-law include protection against loss or damage by fire.
4. Where a loss occurs during the suspension of the policy by reason of nonpayment of an assessment, subsequent payment or tender thereof cannot relate back so as to remove the suspension and default.
5. A demand by the insurer for the payment of an assessment in default is not a waiver of the suspension of the policy.
6. Service of proofs of loss by the insured without any request by the insurer, and the retention thereof by the latter, do not constitute a waiver of such suspension.

APPEAL from a judgment of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Reversed.*

This action was brought to recover upon a mutual fire insurance policy. The company does business in Outagamie county. The policy insured against loss by fire on certain property described therein for a period of five years and was issued in March, 1907. During the fall of 1908 members of the company sustained losses which were adjusted, and the company, having no funds with which to pay the claims, levied an assessment on the members, and the members, in-

cluding the plaintiff, were notified thereof, also the time when the same would become payable and the place of payment. The assessment was payable April 1, 1909, and the plaintiff's share thereof $10.46, which he never paid, although notified to do so. About two years after this assessment and while plaintiff was in default part of his property was destroyed by fire. He then offered to pay the assessment, which tender was refused. Plaintiff deposited in court $10.46.

Plaintiff claims to have sustained a slight loss by reason of lightning striking his barn, which occurred during the time that a former policy issued by the defendant was in force and four or five years before the assessment in question was made and six or seven years before the loss for which this action was brought. The by-laws of the defendant company, which are made part of the policy and printed upon it as the conditions upon which it is issued, contain the following:

"Sec. 9. If any member of this company shall neglect or refuse to pay his *pro rata* share of any assessment made by said company within sixty days after the same shall be demanded by the company or its agent, the board of directors may annul the policy of the member thus in default, and collect such assessment as provided by law."

"Sec. 15. No person shall receive any benefit or advantage from this company under or by virtue of his policy until all assessments against him or his property are fully paid."

The only question submitted to the jury was the amount of loss. The court directed a verdict for the plaintiff for the amount of loss found by the jury, $1,550. Judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *A. H. Krugmeier* and *Cady, Strehlow & Jaseph,* and oral argument by *Mr. Samuel H. Cady* and *Mr. Krugmeier.*

Francis S. Bradford, for the respondent.

KERWIN, J. 1. As a justification for not paying the assessment against the respondent, he claims that he had an unliquidated claim against the appellant for alleged loss sus-

tained several years before by lightning. The claim was denied by the appellant, and under the evidence, if any such claim ever existed, it was trifling in amount, permitted to slumber without action, and was not considered by him after the fire for which he seeks damages in this action, because he tendered the full amount of the assessment against him which remained unpaid at the time of the fire for which he seeks to recover damages in this action. But in any event the existence of such an unliquidated and disputed claim would afford no justification for refusal to pay the assessment under the policy, or relieve the respondent from the penalty of failure to pay during suspension. 2 Joyce, Ins. § 1237; *Mutual L. Ins. Co. v. Girard L. I., A. & T. Co.* 100 Pa. St. 172.

2. Sec. 15 of the by-laws, set out in the statement of facts, providing that no person shall receive any benefit or advantage from the company under or by virtue of the policy until all assessments are fully paid, is a valid condition. *Breakstone v. Appleton Mut. F. Ins. Co.* 149 Wis. 303, 135 N. W. 853; *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111; *Farmers' Mut. Ins. Co. v. Kinney,* 64 Neb. 808, 90 N. W. 926; *Gorton v. Dodge Co. Mut. Ins. Co.* 39 Wis. 121.

The suspension clause in the policy was self-executing. No affirmative action on the part of the appellant was necessary. *Iowa L. Ins. Co. v. Lewis,* 187 U. S. 335, 23 Sup. Ct. 126; *Klein v. Insurance Co.* 104 U. S. 88; *Betcher v. Capital F. Ins. Co.* 78 Minn. 240, 80 N. W. 971; *Hollister v. Quincy Mut. F. Ins. Co.* 118 Mass. 478; *Russell v. Oxford Co. P. of H. Mut. F. Ins. Co.* (Me.) 78 Atl. 459. The foregoing cases clearly demonstrate that appellant is not entitled to recover for a loss occurring during suspension.

In *Hollister v. Quincy Mut. F. Ins. Co., supra,* the by-law was as follows:

"If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing has been left at his last and usual place of abode or business, to pay any assessment, the risk of the company on the policy shall be suspended

until the same is paid, and if the insured shall refuse to pay any assessment, . . . the directors may terminate the same by giving notice thereof in writing. . . ."

It was held that, the plaintiff not having paid the assessment of which he had notice, no further act of the company was necessary, and a loss having occurred under his policy during the default he could not recover. The court held that cancellation was not necessary; that the risk on the policy was suspended by failure of the plaintiff to pay the assessment within the time specified.

The right of respondent to recover in the present action does not turn, as seems to be assumed by counsel for respondent, upon the fact of cancellation of the policy, but upon suspension of benefits during default. Whether the policy was canceled or not, respondent cannot recover during the suspension period. It is established without dispute that respondent failed to pay the assessment within the time required, or at any time before loss.

3. The respondent insists that paying or tendering payment of the amount of the assessment after the loss operated to reinvest respondent as of his rights under the policy before default and suspension. In other words, the claim of respondent is that when tender of payment was made after the loss on which suit is brought, and kept good, the suspension and default were removed and a right of action accrued to recover for the loss by force of the tender. Such a construction of the policy would defeat the wholesome provision respecting suspension during default of payment. The law is well settled against the respondent's contention. *Breakstone v. Appleton Mut. F. Ins. Co.* 149 Wis. 303, 135 N. W. 853; *Hill v. Farmers' Mut. F. Ins. Co.* 129 Mich. 141, 88 N. W. 392; 2 Joyce, Ins. § 1209; *Continental Ins. Co. v. Dorman,* 125 Ind. 189, 25 N. E. 213.

Obviously the provision for suspension during default is put in policies to insure prompt payment of assessments. If

the respondent could remain in default, make no payment, until a loss had occurred and then pay his assessment and recover the loss, there would be little inducement to pay assessments.

The respondent's counsel further argues that the provision precluding benefits during suspension does not suspend the right to recover for loss, but has reference to other benefits or advantages. The provision in sec. 15 seems plain and unambiguous. It precludes any benefit or advantage under or by virtue of the policy until all assessments are paid. Surely the most important benefit or advantage to be derived from the policy is the protection against loss or damage by fire and the right to damages in case of loss. Therefore such benefit or advantage is necessarily covered by sec. 15 referred to.

4. It is further contended by respondent that the appellant waived suspension by sending a postal card and a letter after suspension demanding payment of the assessment. These letters recognized the right of the respondent to pay before the policy was canceled, as might be done, but they by no means waived or purported to waive the suspension of any rights which had accrued or might accrue under the suspension.

It may be true that cancellation in some cases requires affirmative action, though that question is not necessary to decide here. But the suspension clause is self-executing and requires no affirmative action. Suspension operates only during default of payment of assessment. There is no evidence of waiver or estoppel on the question of suspension.

5. It appears that respondent made certain proofs of loss and left them with appellant's secretary. It does not appear that such proofs were prepared or served because of any request from appellant. But on the contrary it appears that the secretary of appellant, when the proofs were left with him, denied liability. There was no waiver of suspension because of service and retention of proofs of loss.

At the close of the evidence the appellant moved for a di-

rected verdict, which motion was denied and due exception taken. We are convinced after a careful examination of the record that the motion should have been granted.

By the Court.—The judgment of the court below is reversed, and the cause remanded with directions to enter judgment for defendant dismissing the complaint.

TRADEWELL, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 16—June 4, 1912.

Carriers: Failure to deliver goods: Action by consignee: Contract limiting liability: Action against initial or connecting carrier? Evidence: Sufficiency: Witnesses: Competency: Wife as agent of husband.

1. Proof of delivery of a box of goods to the initial carrier in good condition and defendant's admission in its answer that it received the same as a connecting carrier, together with evidence that it was delivered by defendant at plaintiff's residence in his wife's absence, and that on her return she found it in an empty condition and bearing evidence that some of the boards had been removed and replaced, is *held* to make a sufficient *prima facie* showing of defendant's failure to deliver the goods.
2. The general rule is that the right of action for failure of a carrier to deliver goods received for transportation is *prima facie* in the consignee.
3. Where a wife shipped goods consigned to her husband and testified that he was the owner, and no issue of ownership was raised by the answer, a finding of ownership in the husband was sustained by sufficient evidence.
4. Proof that plaintiff's wife was in possession of goods consisting in part of articles of clothing made by her from materials purchased as his agent, and all owned by him, which goods she delivered to a carrier in another state consigned to plaintiff in Wisconsin, shows her agency sufficiently to sustain the admission of her testimony both as to the circumstances of the shipment and as to the value of the goods.

5. Upon a shipment of goods by plaintiff's wife as his agent a bill of lading was delivered to her containing the entry "Rel. val. $10," meaning that the value was limited to $10 per hundred pounds. As soon as she discovered this clause written therein she sent her brother to the office of the carrier to have the value placed at $100, but the latter's agent said it was unnecessary. *Held*, that there was no agreement limiting the value to $10, and plaintiff was entitled to recover $85, the real value of the goods.

6. The federal statute (34 U. S. Stats. at Large, 595, ch. 3591) which gives a right of action, in all cases of through shipments, against the initial carrier, does not take away the right of action theretofore existing against a connecting carrier.

WINSLOW, C. J., and MARSHALL and BARNES, JJ., dissent.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an appeal from a judgment in favor of the plaintiff resulting from loss of shipment in transit. The complaint alleges that the plaintiff delivered to the Southern Pacific Railway Company, at Santa Anna, California, a box of household goods consigned to *E. S. Tradewell* at Antigo, Wisconsin, to be forwarded by freight; that at the time plaintiff paid to said railway company the sum of $2.95 as freight charges and took a receipt therefor; that said initial carrier agreed and undertook to safely carry said goods over its line and such other lines as might be necessary to the city of Antigo, Wisconsin, and there deliver the same to plaintiff; that in course of transportation said box of goods was delivered to the defendant, and said defendant for a consideration undertook and agreed with plaintiff to safely carry the goods over its line and deliver them to plaintiff; that it failed to safely carry and deliver said goods; and that the goods were of the value of $85.

The defendant answered admitting that the box of goods was received by it in its capacity as common carrier and transported, carried, and handled as such common carrier under a written contract by which the value of the goods was

agreed to be not more than $10 per hundred weight, and that the liability of the defendant was in any event limited to the declared value of $10 per hundred weight; that the plaintiff had notice of defendant's tariffs, schedules, and classifications relating to shipments; that by said tariffs, schedules, and classifications it is provided that the rate or tariff for shipping household goods of the value of $10 per hundred weight should be $3.15 per hundred weight, and where the value exceeded $10 per hundred weight an addition of fifty per cent. should be made to the rate per hundred pounds, and where no value per hundred pounds was agreed upon an addition of fifty per cent. should be made to the rate per hundred pounds; that the plaintiff's property was shipped at the rate and classifications provided where the declared value was not in excess of $10 per hundred pounds; that the weight of the shipment was ninety pounds. The answer denied all other allegations of the complaint. A jury was waived and the court found:

1. That on the 31st day of May, 1910, there was delivered to the Southern Pacific Railway Company at Santa Anna, California, on behalf of plaintiff, a box of household goods consigned to *E. S. Tradewell,* Antigo, Wisconsin, to be forwarded by freight.

2. That the goods were safely, securely, and firmly packed (enumerating said goods).

3. That at the same time and place the wife of plaintiff paid said Southern Pacific Railway Company the sum of $2.85 as freight charges on said shipment and took a receipt therefor.

4. That in consideration of the freight so prepaid said Southern Pacific Railway Company agreed and undertook to safely carry said goods over its line and deliver the same to another carrier on the route to Antigo, Wisconsin.

5. That the Southern Pacific Railway Company in consideration of the sum of $2.85 carried said box of goods over

its lines and delivered the same at the end thereof to a connecting carrier to be transported to Antigo, Wisconsin.

6. In the course of transportation said box and the goods were delivered to the defendant company.

7. That the said defendant company received said box and the goods from one of the connecting carriers and handled, shipped, and transported said box and goods as a common carrier.

8. That the defendant company failed to deliver at Antigo, Wisconsin, the articles (enumerating them).

9. That the defendant has not received any of the articles shipped to him as above set forth and described in finding No. 8.

10. That the goods described were of the value of $85.

And as conclusions of law the court found that the defendant company is liable to plaintiff in the sum of $85 for failure to deliver said goods. Defendant excepted to the findings of fact and conclusions of law. Judgment was entered for plaintiff, from which this appeal was taken.

For the appellant there was a brief by *William G. Wheeler,* attorney, and *Edward M. Smart,* of counsel, and oral argument by *Mr. Smart.*

Roy C. Smelker, for the respondent.

KERWIN, J. A preliminary question arises upon the face of the findings, as will appear from the statement of facts, which should be noticed. The ninth finding states that the "Defendant has not received any of the articles shipped to him." This is obviously a clerical error and should read, "Plaintiff has not received any of the articles shipped to him." The error is apparent from the fact that the other findings find that the defendant did receive the goods, and the answer admits it.

1. It is insisted that the court erred in finding that the defendant failed to deliver the missing goods. It is said that

the rule of liability of carriers as insurers is so strict and severe that the plaintiff should be held to a strict line of proof in establishing that the loss occurred during the custody of the carrier. It is also argued by counsel for appellant that the proof does not establish that the contents of the box may not have been taken from it while it was awaiting shipment. The answer admits the receipt of the box of goods by the defendant as a connecting carrier. The evidence shows that the box of goods was delivered for carriage to the initial carrier. The proof is sufficient to show that the plaintiff made a *prima facie* case of failure of defendant to deliver the goods. *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204.

There is evidence that the box in question was delivered at the residence of plaintiff during the afternoon in the absence of Mrs. Tradewell; that she found it there in the evening; she saw it standing on end, pushed it over, and it seemed light; there was a hole in the box, but not large enough so the contents could have been taken out through it; that there were no other visible external signs of interference with the box, except that when it was opened it was found that the boards on the top of the box had been broken and the nails did not hold fast, which indicated it had been opened. Mrs. Tradewell testified to the articles lost as found by the court below. The defendant offered no evidence. We think the evidence sufficient to support the finding that defendant failed to deliver the missing goods.

2. It is argued that there was not sufficient proof of ownership or privity with the contract of shipment. The plaintiff, consignee, is the husband of the person who shipped the goods, and the bill of lading names him as consignee. Counsel for appellant says that the undisputed evidence is that Mrs. Tradewell is the owner of the property. Mrs. Tradewell testified that the plaintiff, her husband, was the owner of the goods. Moreover, no issue of ownership was raised by the answer and the complaint alleges that the plaintiff is the con-

signee. The general rule is that the right of action for damages is *prima facie* in the consignee. 3 Hutchinson, Carriers, (3d ed.) sec. 1311, p. 1558. There is no proof in the present case to overcome the *prima facie* case made by the pleadings and the evidence. The wife of plaintiff consigned the goods to him and admitted on the trial that they belonged to him, and the court found for plaintiff upon sufficient evidence on this point.

3. It is further assigned as error that the wife of plaintiff was permitted to testify in his favor without proof of agency. The established facts showed the agency of the plaintiff. She was in possession of the goods and acted as agent of plaintiff in shipping them. The evidence shows that she acted as agent of plaintiff, not alone in shipping the goods to him as consignee, but in purchasing the material and making up the garments included in the articles lost. The evidence in this case is ample to raise a presumption that in the acts performed by the plaintiff's wife respecting the shipment of the goods she acted as his agent. *Savage v. Davis,* 18 Wis. 608; *O'Conner v. Hartford F. Ins. Co.* 31 Wis. 160; *Pickering v. Pickering,* 6 N. H. 120.

4. It is contended that the court erred in not holding that liability should be limited to the sum of $10 under the release valuation clause contained in the bill of lading. It contained the following: "Rel. val. $10." Appellant relies upon *Ullman v. C. & N. W. R. Co.* 112 Wis. 150, 88 N. W. 41; *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 5 Sup. Ct. 151. But the facts in this case clearly take it out of the rule of the above cases. Counsel for appellant say, "It is conceded that both the consignee and Mrs. Tradewell understood that this limited the value to $10." We do not so understand the record. The defendant introduced no evidence upon this point. The evidence is that as soon as the agent of plaintiff discovered the valuation clause written in the bill of lading she immediately objected to it and sent her brother to the depot to

have the valuation placed at $100. When her brother at her request went to the agent of defendant to have the valuation changed, the agent said it was unnecessary. So it cannot be said upon the evidence that there was an agreement between plaintiff and defendant that the valuation should be limited. *Abrams v. M., L. S. & W. R. Co.* 87 Wis. 485, 58 N. W. 780; *Judson v. Western R. Corp.* 6 Allen, 486.

5. It is also assigned as error that the court found the value of the property lost $85, for the reasons, first, that the testimony of the plaintiff's wife should not have been received, and second, that the values are too high. The wife of plaintiff having charge of the shipment as agent of her husband, and a part of her duty in that regard being to agree upon value with the carrier, she was competent to testify as to value of the articles shipped. It is said that the value put upon the goods by Mrs. Tradewell is too high, but no evidence was offered by defendant, so we think the finding on this point is supported by the evidence.

It was suggested upon the argument that the late federal act known as the Carmack amendment to the Hepburn bill limits right of action to the initial carrier. The rule has been laid down in this court that recovery may be had against the last carrier. *Stolze v. A. A. R. Co.* 148 Wis. 205, 134 N. W. 376; *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204. We think the rule established by this court, that action may be maintained against the last carrier, is still in force and not abrogated by the Carmack amendment. The federal act provides:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no

contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof." 34 U. S. Stats. at Large, 595, ch. 3591; *Atlantic C. L. R. Co. v. Riverside Mills,* 219 U. S. 186, 31 Sup. Ct. 164.

We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

The following opinion was filed June 17, 1912:

WINSLOW, C. J. (*dissenting*). The only proof of the value of the goods was the general statement of the wife, received against objection to its competency, that they were worth $85. The well established principle is that when the wife has acted as agent of her husband she may testify as a witness for him with regard to any act done by her, or fact transpiring in the course of her agency and within its scope. *Chunot v. Larson,* 43 Wis. 536; *O'Conner v. Hartford F. Ins. Co.* 31 Wis. 160; *Goesel v. Davis,* 100 Wis. 678, 76 N. W. 768. As to any general fact disconnected with her representative character, she is incompetent to speak as a witness. *O'Conner v. Hartford F. Ins. Co., supra.* It has not been possible for me to see how the general question as to the value of the goods can be considered as being a fact in any way connected with her representative character as the agent of her husband to make the shipment.

I find no evidence in the case showing that the railroad company which received the goods for shipment was ever asked to change the valuation fixed in the receipt to $100. The utmost shown by the evidence is that Mrs. Tradewell's brother took the book to the freight office and received the receipt with the valuation of $10 written on its face, that when he delivered the receipt to Mrs. Tradewell she read it and asked him to have the valuation changed, that he took it to the agent and told him he wanted the valuation changed, and the agent said it was not necessary, and that he then took the receipt. It nowhere appears, so far as I can ascertain, that any request to change the valuation to $100 or any other definite sum was ever made. In this state of the evidence I am unable to perceive how it can be said that the effect of the valuation clause has been changed.

MARSHALL and BARNES, JJ. We concur in the foregoing dissenting opinion by Mr. Chief Justice WINSLOW.

CONWAY, Appellant, vs. JOINT SCHOOL DISTRICT NUMBER Two and others, Respondents.

May 16—June 4, 1912.

Schools and school districts: Dissolution: Territory attached to other districts: Liability for debts: Remedies: Action by creditor: Parties: Power of district to borrow money for building.

1. Where a municipal corporation incurs an obligation and is thereafter dissolved and merged in another municipal corporation by transfer of all its property to the latter, such property remains liable upon the obligation; and this rule applies to school districts.
2. Sec. 424, Stats. (1898), which provides that in case of the dissolution of a school district the town board shall dispose of

the property of the district, pay its debts, and distribute the balance of the proceeds as specified, does not furnish an exclusive remedy to a creditor of such school district; and if the town board fails to act and his debt is not paid he has a right to recover by action.

3. Sec. 944, Stats. (1898), apparently relates to a case where territory is taken from one municipal corporation and attached to another without affecting the existence of the former; but at any rate it provides a mere mode of apportionment of property and indebtedness, and furnishes no remedy for the recovery of money, hence does not exclude the remedy by action.
4. Sec. 430, Stats. (1898), does not prohibit a school district from borrowing more than $600 for building or purchasing a school house, but the limitation is upon the amount of tax to be raised for such purpose in any one year.
5. Where a school district borrowed money to aid in erecting a school house, issued a bond therefor payable in five years, with interest payable annually, and provided for its payment by levying a tax on the property of the district, to be annually collected, sufficient to pay the annual interest on said bond and the principal when due; and thereafter, before collection of the first tax levy, such district was dissolved and its territory divided among three other districts, an action was properly brought against said three districts to recover the amount due and to determine the proportion to be paid by each district.
6. In such case each of the three districts is a necessary party to a complete determination of the questions involved.

APPEAL from an order of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Reversed.*

Suit to recover from *Joint School District No. 2 of the Towns of Upham and Peck, School District No. 2 of the Town of Upham,* and *School District No. 4 of the Town of Upham,* the overdue interest upon a loan of $800 made by the plaintiff on December 23, 1908, to School District No. 3 of the town of Upham, and to ascertain and fix the amount to be recovered from each defendant. The last named school district was on June 19, 1909, by order of the town board of the town of Upham, in part set over to the defendant *Joint School District No. 2 of the Towns of Upham and Peck,* by a like order

made on October 5, 1909, in part set over to defendant *School District No. 4 of the Town of Upham,* and the remainder set over to defendant *School District No. 2 of the Town of Upham,* thus eliminating said School District No. 3 and attaching the whole thereof as mentioned. From an order sustaining demurrers by the defendant school districts the plaintiff appealed.

For the appellant there was a brief by *Finucane & Conway,* and oral argument by *F. J. Finucane.*

Geo. W. Latta and *T. W. Hogan,* for the respondents.

TIMLIN, J. It appears from the complaint that, pursuant to authority conferred upon it by the electors and for the purpose of aiding in the erection of school houses therein, School District No. 3 of the town of Upham on or about December 22, 1908, borrowed $800 from the plaintiff and executed to the latter a bond agreeing to pay him said sum five years thereafter with interest at seven per cent. per annum payable annually. Sec. 475, Stats. (1898). No part of this was paid. At the time of authorizing the loan the electors levied a tax to be annually collected sufficient to pay annual interest on said bond and the principal thereof when such interest and principal came due. Two instalments of interest are due. The debtor school district, within eleven months thereafter and prior to the time when the district clerk was required by sec. 472 to notify the town clerk relative to the amount of taxes raised at the last annual school meeting and the amount to be collected for the annual payment of the loan, was dissolved by reason of the attachment of all its territory to other districts. Sec. 424. These other districts are the three defendants, and each of them succeeded to a fraction of the territory at the time of the loan forming part of School District No. 3. There is no statute keeping School District No. 3 alive after such dissolution, and the plaintiff could not bring

his action against the debtor. He brings this action against the three districts which have succeeded to the property of the debtor school district, and asks to recover the two instalments of interest overdue and that the amount thereof to be paid by each district be ascertained as a necessary preliminary to such recovery. By sustaining the demurrer the court below held that this action could not be maintained. We know not upon what ground, but the respondents here seek to uphold the ruling by pointing to the statutes which they say confer upon the plaintiff another adequate and sufficient remedy. There is some confusion of thought here. No statute purports to provide any remedy by which the creditor in such case may recover his money or compel payment thereof. Statutes exist which provide for the apportionment as hereinafter detailed. But after that apportionment there still remains the enforcement of payment, for which there is no statutory remedy. In several cases in this court a recovery at law was permitted notwithstanding these statutes. *School Dist. No. 9 v. School Dist. No. 5,* 118 Wis. 233, 95 N. W. 148; *S. C.* 123 Wis. 289, 101 N. W. 681; *School Directors v. School Dist. No. 1,* 81 Wis. 543, 51 N. W. 874; *School Directors v. School Directors,* 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049.

The principal relief sought by the plaintiff is the recovery of damages. Ancillary to this he asks to have it ascertained how much is due from each of the defendants. This latter can hardly be said to be a cause of action, because for this relief alone an action could not be maintained. In order to ascertain the nature of this preliminary inquiry it is proper to scan the statutes. The town board has power to alter or unite existing school districts or form new districts. Sec. 412. If the district has contracted a debt, it must not be so altered that the debt will exceed five per cent. of the last assessed valuation of the taxable property remaining therein. Id. This last does not apply to the instant case because District

No. 3 was entirely dissolved. No territory shall be detached from one school district unless by the same order it be attached to another, and a district may be dissolved by attaching all its territory to other districts. Sec. 418. Where a new district is formed in whole or in part from one or more districts possessed of a school house or other property, the proportion of the value of the school house and other property justly due to the new district, according to the taxable property of the respective parts at the time of division, shall be ascertained by the town board, and such amount of any debt due from the former district to any person which would have been a charge upon the new had it remained in the former district shall be deducted from this proportion of the value of the property to which it would otherwise have been entitled. Sec. 420. The part of this last statute to be considered in connection with the instant case is the provision for apportionment on the basis of the value of the taxable property at the time of division. This, it must be understood, refers to the apportionment between the districts and not to the annual levy against the property. This last must, like other taxes, be annually apportioned to the taxable property according to the value found in the tax roll for the year in which the tax is apportioned to the property, levied, and collected. Apportionment to the respective districts is one thing, apportionment by the town clerk on the tax roll against the property of the district which is liable quite another. The town board making such division and apportionment must certify to the district clerk of the district retaining the school house or other property the amount due to the new district. This amount, together with other taxes voted by the electors of the district retaining the school house and the amount to be paid on any debt, must be certified by the school district clerk on or before the third Monday of November in each year to the town clerk, and the latter apportions it against the property

in that school district according to value and places it on the tax roll. Sec. 472. Whenever a district shall be dissolved by the town board attaching all its territory to some other districts, the board is to take charge of the property belonging to the dissolved district at the time of its dissolution and dispose of the same and apply the proceeds to the discharge of its debts and pay over the remainder, if any, to the treasurer or treasurers of the district or districts to which the property of the old district has been attached, in proportion to the valuation of the property attached to each as such valuation appears from the last tax rolls of the respective towns. Sec. 424. This covers the instant case so far as it describes a district dissolved by reason of the attachment of all of its territory to some other district. But the complaint shows in the instant case that this was accomplished by two orders of the town board, one made on June 19, 1909, detaching certain territory from School District No. 3 and annexing the same to the defendant *Joint School District No. 2,* but leaving the School District No. 3 existing as a school district. October 5, 1909, by another order, the town board dissolved District No. 3 by attaching all its territory to the defendants *District No. 2* and *District No. 4.* The complaint does not state whether School District No. 3 at either date had any property, or that the town board took any action toward apportioning property or liabilities. It does state, however, that the district clerk of School District No. 3 never made any verified statement in writing to the town clerk showing the taxes voted for the purpose of paying the bond in suit, and that District No. 3 was dissolved before the time expired for such statement to be made, and that no provision has ever been made for the apportionment of the indebtedness due by reason of this bond upon the territory liable for the payment of the same. The town board was therefore without official knowledge that District No. 3 owed any debt. There has

been no District No. 3 and no district clerk in existence since October 5, 1909. It is impossible to send back the cause for an apportionment by the town board which will comply with the statute. This would seem to bring the case within the rule of *Mount Pleasant v. Beckwith,* 100 U. S. 514, cited with approval in *Washburn W. W. Co. v. Washburn,* 129 Wis. 73, 82, 108 N. W. 194. Where a municipal corporation incurs an obligation and is thereafter dissolved and merged in another municipal corporation by transfer of all its property to the latter, such property remains liable upon this obligation. There is by statute a tax levy provided for against such property and this is to be made when the obligation is incurred. Under our statutes this liability is enforced by the courts against the property received from the debtor corporation through the taxing officer of the corporation to which such territory has been attached and whose duty it is to display the tax upon the tax roll. Secs. 487, 488.

With reference to the foregoing statutes the respondents urge that the apportionment of this liability among the defendants must be made by the town clerk, but they fail to point out any statute imposing that duty upon such clerk except sec. 472, *supra,* which is not applicable to the instant case because the clerk of the debtor district never transmitted to the town clerk any statement or information concerning this debt.

A more serious question arises with reference to whether the remedy under sec. 424 is exclusive, but the plaintiff is here asserting a common-law right to recover for a debt. The omission of the town board to take the steps required by sec. 424 was not brought about by any default for which he is responsible. He was not notified or entitled by statute to notice of the dissolution of the debtor district. Even if he might at this late day compel the town board to convene and dispose of the property, if any, of the debtor district by grant

and apply the proceeds to the payment of his bond so far as necessary, there is nothing to show that that remedy is adequate. It does not appear that the debtor district had any property at the time of its dissolution. In any event this statutory remedy, if it exists, is not exclusive, because the right which the plaintiff asserts to recover his money is not one created by or solely resting upon statute. *Mount Pleasant v. Beckwith, supra; Goodrich v. Milwaukee,* 24 Wis. 422; *Morgan v. South Milwaukee Lake View Co.* 100 Wis. 465, 76 N. W. 354; *Saxville v. Bartlett,* 126 Wis. 655, 105 N. W. 1052; *School Dist. No. 9 v. School Dist. No. 5,* 118 Wis. 233, 95 N. W. 148.

Sec. 944, Stats. (1898), is also relied on by respondents. It is argued that the remedy there given is exclusive. That section appears to cover the instant case so far as it provides that whenever any municipality shall incur any indebtedness by the issue of bonds or municipal obligations the territory embraced within its limits shall remain liable to the payment thereof until such bonds or obligations are fully paid. This statute provides that the word "municipality" as used therein shall be construed to include school districts, but not every part of that section can be applied to the instant case. If any territory shall be set off or taken from such municipality after such indebtedness is incurred and no other provision shall have been made for the apportionment and collection of such indebtedness, it is provided that the county board of the county in which the municipality is situated shall annually apportion to all such territory so set off a *pro rata* portion of the amount of taxes necessary to be raised in such year for the payment of principal and interest. This is to be done in the ratio which the taxable property in such detached territory bears to the taxable property remaining liable to such debt in the municipality from which the territory was detached according to the last assessed valuation of such

property. This contemplates an annual adjustment, and the apportionment in each year is based on the last preceding assessment, while the statutes relating to the division of school districts base the apportionment of property on the one assessment immediately preceding such division. Again, sec. 944 provides that the detached territory shall also receive from the portion remaining its just share of the credits of the municipality and be liable to such remaining portion for the excess of such share of the municipal property as is situated within it. But it further provides that such credits and the value of such property last mentioned shall be apportioned by ascertaining what ratio the portion detached bears to the territory from which the same has been detached, and the last prior equalized assessment shall be the basis for determining the same. What is meant by the words "equalized assessment" is not very clear. That expression is used in the note to sec. 1073 with reference to the ascertainment of the relative value by the county board and also with reference to the action of the board of review. See *Cramer v. Stone,* 38 Wis. 259, and sec. 1060, Stats. (1898). But sec. 944 apparently relates to a case where territory is set off or taken from some municipal corporation and attached to another but the original corporation is still in existence. This section, however, does not purport to furnish any remedy for recovery of money, but merely a mode of apportionment. It would leave the creditor still compelled to resort to the courts to enforce his claim after the apportionment thus made. Several actions for the recovery of money from a municipal corporation without this apportionment have been entertained in this court in which that section was expressly referred to. *School Dist. No. 9 v. School Dist. No. 5,* 118 Wis. 233, 95 N. W. 148; *School Directors v. School Dist. No. 1,* 81 Wis. 543, 51 N. W. 874; *School Directors v. School Directors,* 81 Wis. 428, 51 N. W. 871, 52 N. W. 1049. In this case it is

said that, there being a remedy by ordinary action, there is no remedy by *mandamus*. Upon the whole we are satisfied that this action is properly brought against the defendants.

Respondents make the further point that School District No. 3 had no power to borrow more than $600. This is based upon an incorrect construction of subd. 5 of sec. 430. The provision there found is "that no district containing a population of less than 250 inhabitants shall have power to levy and collect a tax for building, hiring or purchasing a school house of more than $600 in any one year." This limitation is manifestly not upon the whole cost of the school house, but upon the amount of tax to be raised for such purpose in any one year. Sec. 475 required the obligation to be payable in annual instalments and within ten years. At that time these statutes harmonized. Sec. 475 was amended by ch. 172, Laws of 1905, by adding the words "or otherwise," so as to read, "which shall be in annual instalments or otherwise, the last of which shall be payable in not exceeding fifteen years," etc. As the statutes read now, the debt must be collected by instalments of not to exceed $600 in any one year.

It seems to us that the complaint states a good cause of action to recover the money due from the three defendants, and that the preliminary steps of ascertaining from the tax roll next preceding the time of division the proportion to be recovered from each may be taken in such action. No objection on the ground of misjoinder is taken, but in any event each of these defendants is a necessary party to a complete determination of the questions involved herein. Sec. 2603, Stats. (1898).

The order of the circuit court should be reversed.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

MILLS and wife, Respondents, vs. MORRIS and others, Appellants.

May 16—June 4, 1912.

Parties: Bringing in new defendants: Necessary parties: Executors and administrators: Husband and wife: Denial of successive motions.

1. A motion to make the "estate" of a decedent a party to an action was properly denied where, at the time, there was no personal representative upon whom service could be made.
2. A note and mortgage given by the purchasers of land for a part of the purchase price were transferred by the vendor prior to her death. After such death the purchasers brought suit against the transferee, alleging a defect in the vendor's title to the land, that the consideration for the note and mortgage had therefore failed, and that the transfer of the note and mortgage to defendant was a gift and without consideration; and praying that such securities be surrendered up and canceled. It was claimed by defendant and her husband that the securities were taken by her (with his consent) in settlement of an indebtedness of the decedent to them for care and nursing; that if the securities were canceled they would have a claim against decedent's estate for such services; and that the decedent before her death gave to her relatives considerable sums which it would be the duty of her administrator to collect and apply on such indebtedness. *Held*, that it was not necessary to bring in the administrator of the decedent as a party defendant, either for his protection or in order to a complete determination of the controversy.
3. Although defendant's husband also claimed that he expected to receive some benefit from the securities assigned with his consent to his wife, yet, there being facts before the trial court from which it might conclude that the moneys due for services rendered to the decedent were the separate property of the wife, there was no error in denying a motion that the husband be made a party.
4. A second and third motion to bring in an additional party may properly be denied where a final order has already been made denying the first motion, which the moving parties have made no attempt to vacate, modify, or set aside.

APPEAL from orders of the municipal court of Outagamie county: THOMAS H. RYAN, Judge. *Affirmed.*

The complaint in this action sets forth that in February, 1910, the plaintiffs purchased two parcels of land from one Icybinda Spaulding, now deceased, for $3,700, paying $1,500 of the purchase price in cash and executing a note secured by a mortgage on the real estate purchased for the balance of the purchase price; that the lands purchased were conveyed by a deed containing the usual covenants of warranty; that at the time said purchase was made the grantor represented that she had good title to the premises conveyed and furnished an abstract showing that she had good title thereto; and that in making the purchase plaintiffs relied on said representations as to title and on said warranty deed. The complaint further set forth that one of the parcels of land so purchased was the homestead of the husband of the grantor, Spaulding, who died intestate in 1904, and that his widow, the plaintiffs' grantor, claimed title to said homestead as the sole heir at law of her husband; that the homestead tract was worth $2,200, and that the other parcel of land, about which there is no dispute, was worth $1,500; that plaintiffs' grantor was appointed administrator of her husband's estate; that in support of her petition for the assignment of the residue of said estate she represented that her husband had a son *Adelbert Spaulding* by a former marriage, but that he had disappeared for more than ten years and had not been heard from during that time, and when last heard from he was in British Columbia and that she believed him to be dead, and that she was the only heir at law of her deceased husband; that the defendant *Addie Morris,* who is a sister of plaintiffs' grantor, also gave evidence of a like tenor on the hearing of said petition, and that both of said parties suppressed facts which should have been submitted to the court; that upon the evidence of said parties the plaintiffs' grantor was adjudged to

be the sole heir of her husband, and his estate, including the homestead, was assigned to her.

It is further alleged that plaintiffs' grantor died in October, 1910, and that before her death she assigned and transferred to the defendant *Addie Morris* the note and mortgage referred to, and that said transfer was a gift and was without consideration, and that defendant *Morris* had notice of facts which would preclude her from claiming that she was a *bona fide* purchaser for value in due course. It is then alleged that ten days prior to the commencement of the action one *Hiram A. Spaulding* put in an appearance and claimed to be the son of the husband of plaintiffs' grantor and the identical person referred to in the probate proceedings as *Adelbert Spaulding*, and likewise claimed to be the owner of the homestead parcel of land as sole heir of his father, and that plaintiffs verily believe that said *Hiram A. Spaulding* is the son and heir of Charles Spaulding, deceased. It is further alleged that the defendant *Addie Morris* is wholly insolvent, and the relief prayed for is that she be enjoined from transferring the note and mortgage, and that the same be surrendered up and canceled because the consideration therefor has wholly failed.

The answer of *Addie Morris* sets forth that plaintiffs purchased the lands with full knowledge of the fact that there might be a claimant to a part thereof, and purchased them for a reduced consideration because of the known fact that the title might prove defective. She further alleges that she purchased the note and mortgage in suit for a full and adequate consideration. The defendant *Hiram A. Spaulding* served an answer and cross-complaint in which he alleged that he was the son of Charles Spaulding, deceased, and asserted ownership to the homestead tract. Thereafter, *L. J. Morris*, the husband of the defendant, made an affidavit setting forth that the note and mortgage in suit were transferred to *Addie Morris* in consideration of services, care and nursing

of said Icybinda Spaulding, and that he consented that such transfer should be made to his wife and that he expected to receive a benefit from the earnings of his wife in this regard, and that he and his wife have a large claim against the estate of said Icybinda Spaulding for the services rendered as aforesaid, and that he was a necessary and proper party to the action, as was the estate of said Icybinda Spaulding. His wife made a like affidavit, and on these affidavits a motion was made for an order making *L. J. Morris* and the aforesaid estate parties defendant. On November 2, 1911, this motion was denied. On November 4th a second motion was made on much the same showing, except it was alleged that the husband was entitled to the compensation earned by his wife in nursing said Icybinda Spaulding, and that the assignment of the note and mortgage was taken in the name of *Addie Morris* with the consent of her husband for the benefit of both. This motion was denied on November 9th. In the meantime a special administrator was appointed for the estate of Icybinda Spaulding, and one *Dudley H. Pierce* was named as such administrator, and on November 10th a third motion was made by *Addie Morris* and *L. J. Morris,* her husband, and said *Pierce* as special administrator, that the two latter be made parties to the action, based on substantially the same showing as that made on the former motions. This motion was denied on November 13th, and from the three orders entered on said motions *Addie Morris, L. J. Morris,* and *Dudley H. Pierce* appeal.

The cause was submitted for the appellants on the brief of *Humphrey Pierce,* and for the respondents on that of *John Bottensek.*

BARNES, J. The questions for decision are: (1) Did the court err in refusing to make "the estate of Icybinda Spaulding" and the special administrator of her estate parties de-

fendant? (2) Did the court err in refusing to make *L. J. Morris,* the husband of the defendant *Addie Morris,* a party defendant?

We apprehend that there can be no doubt that the motions to make the "estate" a party defendant were properly denied. When these motions were made there was in existence no executor or administrator or any person on whom service could be made. The theory on which it is claimed that the administrator is a necessary party is this: It is averred that Icybinda Spaulding was indebted to *Mrs. Morris,* or to her and her husband, in a large sum for care and nursing; that such services were worth the amount of the note and mortgage, and that if these are held void and canceled the *Morrises* will have a legitimate claim against the estate for the value of such services; that Mrs. Spaulding distributed considerable money in gifts among her relatives before her death which should be used in paying debts if there were any, and in the event of the note and mortgage being held void it will be the duty of the administrator to collect such money from the distributees, to the end that it may be applied in payment of the debt which was supposed to be paid by the transfer of the note and mortgage. It is further claimed that the administrator has a valid defense to this action because the plaintiffs assumed the risk of the son and heir of Charles Spaulding making claim to the property purchased, by paying a reduced consideration therefor because of the eventuality which has occurred.

It is not claimed that the administrator has any defense to the plaintiffs' cause of action that is not available to the defendant *Addie Morris,* so she is not injured in this regard by a failure to make the administrator a party. Counsel states that a complete determination of the controversy cannot be had without the presence of the estate of Icybinda Spaulding and that such estate is vitally interested in the controversy. Counsel fails to point out the reasons which support these

statements. The controversy is over the right of the plaintiffs to have a note and mortgage canceled which plaintiffs assert was given without any consideration. The holder and legal owner of that note and mortgage is made a party defendant, and we fail to see why this controversy cannot be settled without the presence of the administrator of the estate of Mrs. Spaulding. Neither do we perceive why it is necessary to make the administrator a party for his protection. Under sec. 2610, Stats. (1898), the court is required to bring in additional parties when a complete determination of the controversy cannot be made without them or when they have such an interest in the subject matter of the controversy that their due protection requires that they be brought before the court. Neither situation is presented in this case in so far as the administrator is concerned.

The practice pursued in endeavoring to make *L. J. Morris* a party defendant shows persistency to say the least. After an order was made denying the first motion counsel proceeded to ignore its existence and promptly applied for a second one, and after that application was denied, without asking to vacate either of the existing orders, made a third application. When the first application was before the court, it appeared from the answer of *Addie Morris* and also from her deposition under sec. 4096, Stats., that the note and mortgage in suit were given to her in payment of services rendered by her for Mrs. Spaulding. It appeared from the affidavits filed by her and her husband in support of the motion that the note and mortgage were assigned to the defendant *Addie Morris* with the consent of her husband, and the only claim the latter makes in reference thereto is that he expects to receive some benefit from his wife from the proceeds of the security. There were facts before the court from which it might conclude that the assignment was made in payment of a debt due the wife and which was her separate property, or that if the

husband had any claim against Mrs. Spaulding he made a gift to his wife of the amount due. Technically the court might have denied the second and third motions on the ground that there was a final order already made which the moving parties had not attempted to vacate, modify, or set aside. But we think the subsequent orders must stand when considered on the merits. The shifting of positions such as was made here should not be encouraged, and the court might well conclude that the one first taken was in accordance with the fact. Even after the shift was made, it is, to say the least, doubtful if the affidavits filed do not show that the money due for the services rendered for Mrs. Spaulding were the separate property of the wife. So approaching the question of the right of *L. J. Morris* to be made a party defendant from several different viewpoints, it is apparent that the order refusing the relief asked should not be disturbed by this court.

By the Court.—The orders appealed from are affirmed.

LAND & LOAN COMPANY, Appellant, vs. KESLER, Respondent.

May 16—June 4, 1912.

Tax titles: Limitations: Constructive possession: Occupancy: Possession of part of known farm.

1. In order that the constructive possession of a tax-title claimant, growing out of the recording of the tax deed, may ripen into an absolute title under the statute (sec. 1187, Stats. 1898), it is necessary that the land remain vacant and unoccupied during the entire statutory period; and the planting and harvesting of two crops upon a small clearing on a farm of 120 acres, accompanied by the annual payment of taxes by the occupant, is sufficient to arrest the running of the statute.
2. Although such acts of occupancy are confined to one forty, their effect is not necessarily limited to that forty, but where such

forty constitutes part of a known farm, as where three contiguous forties were entered as a homestead and, according to the course and custom of the country, a clearing was made on one forty and the buildings erected thereon, adverse possession of the part actually occupied will extend by construction to the remainder of the farm.

APPEAL from a judgment of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action by tax-title claimant to bar former owner. The foundation of plaintiff's title was a certain tax deed executed by Oneida county, February 27, 1905, based on the sale of 1901. One of the issues litigated on the trial was whether or not such deed was void on its face. It reads in part as follows:

"Whereas, the *Land & Loan Company,* assignee of T. W. Hogan, and the *Land & Loan Company,* assignee of Oneida county, has deposited in the office of the county clerk of the county of Oneida, in the state of Wisconsin, eight certificates of R. M. Douglass, the county treasurer of said county, whereby it appears (as the fact is) that the following described pieces or parcels of land lying and being in the county of Oneida, to wit: [here follow descriptions of eight parcels] were for the nonpayment of taxes separately sold by R. M. Douglass, the said county treasurer of said county, at public auction, at Rhinelander, in the county of Oneida, Wisconsin, on the 21st day of May in the year of our Lord one thousand nine hundred and one to the said T. W. Hogan and Oneida county, for the sum of $44.02 in the whole; which sum was the amount of taxes assessed and due and unpaid on said (several) tracts of land, together with the costs and charges of such sale, due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchasers."

The answer averred, among other things, that the premises were a government homestead; that the defendant and her deceased mother had been in the actual and continuous possession of same from 1896 to the time this action was begun; and pleaded sec. 1187, Stats. (1898), as a bar to the action.

The court found, upon the evidence introduced by the respective parties upon the issue as to occupancy, in favor of the defendant, held the tax deed was void on its face, and entered judgment dismissing plaintiff's complaint, with costs, from which it appealed.

For the appellant there was a brief by *Smart, Van Doren & Curtis,* and oral argument by *R. N. Van Doren.*

T. W. Hogan, for the respondent.

VINJE, J. Plaintiff claims (1) that there is no evidence to sustain the finding of such occupancy by the defendant within three years after the recording of the tax deed as to defeat the statute of limitations from running in its favor as to any of the three forty-acre tracts; (2) that if there is such evidence, it is limited to only one forty-acre tract and cannot affect the other two; and (3) that the court erred in holding the tax deed void on its face.

It appears that in 1894 William Weenink, the father of the defendant, entered three contiguous forty-acre tracts as a homestead; that he continued to improve and occupy the land as a homestead until on or about the 16th day of November, 1896, when he died intestate, leaving his widow, Minnie Weenink, and this defendant as his only heirs at law. Thereafter the widow, by the aid of Anthony Weenink, her brother-in-law, continued to improve the homestead until she made final proof thereon some time during the year 1899. A patent duly issued to her February 25, 1901. The land was assessed for taxes during the year 1900, and plaintiff purchased the certificate, upon which the tax deed in question is based, at the tax sale of 1901. In 1907 a forest fire swept over the premises and destroyed all the buildings thereon, since which time there is no claim that they have been occupied. Upon the question of occupancy the defendant testified that she was on the premises last in 1906; that there was then a crop of timothy hay on the clearing and that it looked

good to her; that she was there in 1904 and in 1905 also; that in 1905 a crop of rye was put in; that in that year the clearing was seeded down; that in 1904 the clearing had a crop of potatoes, rutabagas, and turnips, and that after 1905 it was in rye, hay, and timothy; also that she picked berries on the land in 1905 and in 1904.

Anthony Weenink testified, in substance, that he worked the place after Mrs. Weenink proved up and got her patent; that he kept on working it in the same way after she got the patent as he did prior to that time; that he did so at her request from 1901 up to the time of her death in 1907. He said there was a house, barn, stable, shed, and hay shed on the premises; that a few of Mrs. Weenink's tools, bedding, and furniture were there. In 1905 and 1906 he cut and harvested the crops. Four or five acres were cleared of stumps and some more partly cleared. It also appears that the defendant and her predecessors in title paid taxes on the land for each year from 1901 to the time of the commencement of this action, and that none of them knew of the outstanding tax title until a short time before the action was begun. It also appears that the mother of defendant had the land surveyed and lines run out in 1906 and again in 1907, and during those years had the timber estimated on the land; and that some marsh hay was cut on the forties besides the one on which the improvements were located.

Three witnesses on behalf of plaintiff testified as to occupancy. One, Reitz, said he first saw the land in 1909; that he was sent there by plaintiff to look it over; that he saw the remains of a house and evidences of a former clearing, but in his opinion the same had not been cultivated for seven or eight years. Joe Gauthier, a fisherman living near Pelican Lake, testified that he had lived within about a quarter of a mile from this land for about six years; that so far as he knew there had been no cultivation of the clearing at any

time after the year it was proved up. It is apparent from the testimony, however, that he thought final proof was made in 1907, for he seems to be of the impression that it took place in the same year the forest fire occurred. At best, his evidence is of little value, and it is only to the effect that, so far as his knowledge goes, he thinks there was no cultivation of the clearing within the last five or six years.

Another witness, Henry Timmers, lived eight miles from the land, but during the last five or six years had been working around Gauthier's place as a guide for fishermen. He testified he had been around these premises every fall; that he had observed a small clearing on them; that he could not tell the exact extent of the clearing, but judged it to be from three to five acres; that the land showed evidence of cultivation—here and there a spot; that this was seven years ago; that he could not say whether or not Weenink had done any work on the land in the last five or seven years; that there were small patches on the clearing where one could go in and cut hay; that he could not tell whether any hay had been cut on the clearing within the last five or six years. He further states, on cross-examination, that he was unable to say whether he first saw the land in 1905 or 1906; that it was something like that; that he was unable to say whether or not any one cut hay on it in 1907; that he did not watch them; that hay was cut on the marsh; that he himself, about five years ago, cut some hay just on the corner of the land; that as to the years 1905 and 1906 he did not see any one cut hay there, and that he did not notice.

Bearing in mind the elementary rule that, if the evidence in a case is fairly sufficient to sustain a finding made by the trial court, it will not be set aside on appeal, it seems clear that the finding of occupancy by defendant of the forty upon which the improvements were located cannot be set aside. That such occupancy is sufficient to arrest the statute of lim-

itations from running in favor of the plaintiff as to that tract, is the settled law of this state. Sec. 1187, Stats. (1898); *Dreutzer v. Baker,* 60 Wis. 179, 18 N. W. 776; *Davies v. State,* 72 Wis. 54, 38 N. W. 722; *Flanders v. Washburn L. Co.* 139 Wis. 390, 121 N. W. 250; *Laffitte v. Superior,* 142 Wis. 73, 125 N. W. 105. Considering the evidence most favorable to support the finding, as we must do, it appears that the clearing was cropped each year up to the fire in 1907. The plaintiff's tax deed was dated February 27, 1905, and recorded March 25, 1905. Hence, at least two crops were removed after the issuance and recording of the tax deed. This was open and tangible occupancy adverse to plaintiff and visible to any person examining the land, and of sufficient duration to arrest the statute. For land must remain vacant and unoccupied continuously during the whole period named in the statute in order that the constructive possession of a tax-title claimant can ripen into an absolute title. *Cornell Univ. v. Mead,* 80 Wis. 387, 49 N. W. 815; *Midlothian I. M. Co. v. Belknap,* 108 Wis. 198, 84 N. W. 169; *Flanders v. Washburn L. Co.* 139 Wis. 390, 121 N. W. 250.

Assuming that the evidence of occupancy is sufficient to interrupt the statute as to the forty on which the buildings and clearing were located, yet it is urged that such occupancy cannot draw to it that of the other two forties and defeat plaintiff's title as to them, and the cases of *Coleman v. Eldred,* 44 Wis. 210; *Pepper v. O'Dowd,* 39 Wis. 538; *Smith v. Ford,* 48 Wis. 115, 2 N. W. 134, 4 N. W. 462; *Wilson v. Henry,* 40 Wis. 594; *St. Croix L. & L. Co. v. Ritchie,* 78 Wis. 492, 47 N. W. 657; and *Laffitte v. Superior,* 142 Wis. 73, 125 N. W. 105, are relied upon to sustain such claim. In none of those cases did the lands in question constitute a known farm, and the rule there announced does not apply to the case at bar. Here the three forties were entered as a homestead, were contiguous, and, according to the usual course and custom of

the country, a clearing was made on one of them and buildings erected thereon. The evidence is that this homestead was in substantially the same condition and used in the same manner as other homesteads in that locality, with the single exception, perhaps, that the buildings were not always occupied. Taxes were paid on it by the original owners continuously from 1901 to the time the action was begun, and that fact, while it may not be evidence of occupation, is very persuasive proof that there was no abandonment of the farm by the owners and is evidence tending to show that the possession by the former owners was adverse. *Murray v. Hudson,* 65 Mich. 670, 676, 32 N. W. 889. This court decided as early as *Pepper v. O'Dowd,* 39 Wis. 538, that when a part of a known farm "is left uncleared or uninclosed, according to the usual course and custom of the adjoining country, adverse possession of the part actually occupied may extend, by construction, to the part left uncleared or uninclosed according to such course and custom." This rule has since been steadily adhered to. *Finn v. Wis. River L. Co.* 72 Wis. 546, 40 N. W. 209; *Midlothian I. M. Co. v. Belknap,* 108 Wis. 198, 84 N. W. 169; and *Flanders v. Washburn L. Co.* 139 Wis. 390, 121 N. W. 250. The facts in the case last cited are very similar to the facts in the case at bar and the rule there announced controls the question here involved.

It is claimed the tax deed is void on its face because it shows a joint sale to T. W. Hogan and Oneida county, and that it comes within the rule of *Sprague v. Cœnen,* 30 Wis. 209. Plaintiff contends that the rule in the *Sprague Case* does not apply, because there are several parcels of land described in the deed in the instant case, while only one parcel was described in the *Sprague Case,* and further, that the case of *Hunt v. Stinson,* 101 Wis. 556, 77 N. W. 901, takes it out of the rule announced in the *Sprague Case.* Having reached the conclusion that the tax deed is defeated as to all the three

forties on the ground of the occupancy thereof by the original owners within the three years after the recording of the tax deed, it becomes unnecessary to determine whether or not the deed is void on its face, and we express no opinion relative thereto.

By the Court.—Judgment affirmed.

KLUNDT and others, Respondents, vs. KELLER and others, Appellants.

May 16—June 4, 1912.

Pleading: Overruling demurrer ore tenus: ***Harmless error: Bonds: Breach of conditions: Sale of stallion: Fraud.***

1. If the overruling of a demurrer *ore tenus* in this case was error, it is not ground for reversal, the complaint having been formally amended to meet the supposed defect at the close of the plaintiff's case, and defendants not having been misled or prejudiced.
2. Before paying a commission to their agent for selling a stallion, plaintiffs required from him a bond for repayment thereof, conditioned that the sale was valid and binding, that the note received for the price should be paid when due, and if not that the agent should pay back the amount paid to him. *Held*, that upon breach of the conditions plaintiffs might recover on the bond, even though at the time of giving it the agent had told them of facts going to show the sale and note invalid, and even though they had sold the note to another person.
3. Where the sale of a stallion to a number of farmers is not to be effective unless fifteen shares be taken by purchasers, such shares must be taken in good faith, and the purchase of shares by mere stool pigeons to whom the seller himself furnishes the money therefor vitiates the whole transaction.

APPEAL from a judgment of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action at law upon a money bond. The plaint-

iffs are partners at Tigerton in this state, doing business under the name of the Tigerton Stud Horse Company. The partnership owned a stallion named Carnival in February, 1904, and employed the defendant *Keller* to sell the same. *Keller* sold the horse to some farmers at Symco, Wisconsin, during the last named month, and received a promissory note for $3,000 signed by eleven farmers, upon which $400 was indorsed as having been paid. *Keller* delivered the note to the plaintiffs and claimed $940 for his services and expenses in making the sale. The plaintiffs sold the note for $2,529.92 to one Swanke, and guaranteed the payment thereof. Soon after this sale the plaintiffs settled with *Keller* for his services in the sale, and paid him $940 upon his giving them the bond upon which this action is brought, signed by himself as principal and the other defendants as sureties. The penal sum named in the bond is $940, and the conditions as follows:

"Whereas the said Tigerton Stud Horse Company has, on delivery of this bond, agreed to pay the above bounden, *Otto Keller,* the sum of nine hundred forty ($940) dollars, as a settlement for expenses and services rendered for selling a certain stallion owned by said company:

"Now, therefore, the conditions of this obligation are such that if the sale of the said stallion shall be valid and binding, and the note for $3,000 received by the company for the purchase price of said stallion shall be a good *bona fide* note and shall be paid by the makers thereof when due; and in case said note shall not be good and binding, the said bounden, *Otto Keller,* will then in that case pay back to said Tigerton Stud Horse Company the said sum of nine hundred forty dollars ($940), on demand, received for his expenses and services for selling said stud horse, then this obligation to be void and of no effect, otherwise of full force and effect."

Swanke brought action on the note against the makers, who defended on the ground of false and fraudulent representations made by *Keller.* The action having been tried and a verdict for Swanke directed, the makers appealed to this

court, and the judgment was reversed on the ground that the questions at issue should have been submitted to the jury. 138 Wis. 654, 120 N. W. 414. The plaintiff having failed to have the action remitted within a year, it was dismissed in November, 1910, on motion of the defendants therein. The trial court directed a verdict for the plaintiffs for $940, from which amount the plaintiffs afterward remitted the sum of $100, because by the original contract with *Keller* the plaintiffs had agreed to pay his expenses in making sale of the horse not exceeding $100. Judgment being entered for the amount of the verdict as so reduced, with interest, the defendants appeal.

For the appellants there was a brief by *Olen & Olen,* and oral argument by *W. A. Olen.*

For the respondents the cause was submitted on the brief of *Kreutzer, Bird, Rosenberry & Okoneski.*

WINSLOW, C. J. A demurrer *ore tenus* to the complaint was interposed at the opening of the case, but inasmuch as the complaint was formally amended to meet the supposed defect at the close of the plaintiffs' case and it is plain that the defendants were not misled or prejudiced, there was no prejudice in the original ruling even if it were to be held erroneous when made. The questions in the case were very simple. The bond was conditioned that the sale should be binding, the note good and paid when due, *or* the $940 paid back.

The note was not paid, though long since due, and it was affirmatively shown without substantial dispute that the sale was not valid or binding. It was understood between *Keller* and the farmers that in order to render the sale effective there must be sold fifteen shares in the horse of $200 each, whereas in fact no more than thirteen shares were ever sold to *bona fide* purchasers. These facts appear from the testimony of the farmers and of *Keller* himself. *Keller* admits that he gave two of the supposed shareholders $200 apiece on the under-

standing that when the time came each should pay back the $200 as if he was buying a share in the horse, that this was done, and the supposed payments indorsed on the note. Of course any such secret operation vitiated the entire transaction. If the sale was not to be effective until fifteen shares had been sold, it cannot be made effective by the purchase of two shares by mere stool pigeons who have been furnished the money to make the purchase by the seller himself. Fifteen shares must be in good faith sold, and this it appears was never done. Testimony was introduced tending to show that *Keller* told some of the plaintiffs at the time he received the $940 and gave the bond that he paid some of the signers' money in order to get them to sign the note, but this cuts no figure on the questions here presented. The plaintiffs took the bond to protect themselves against just such contingencies; in fact it is not difficult to suppose that they realized from this fact itself that collection of the note would be difficult or impossible, and hence insisted on the bond as they had a right to do.

There is no doubt, therefore, that every condition of the bond has been breached: the sale was not binding, the note uncollectible and never paid, and *Keller* has never paid back the $940.

The fact that the plaintiffs had sold the note to another is not material: the action is not on the note, nor does recovery depend on its ownership. Before paying $940 of their own money to *Keller* they required the bond and received it. They are plainly entitled to recover back the money so paid out on the faith of the bond when they show that its conditions have been breached. There are no other questions of sufficient importance to require treatment.

By the Court.—Judgment affirmed.

FOREST COUNTY, Respondent, vs. SHAW, Appellant.

May 16—June 4, 1912.

Counties: Committees of county board: Appointment of outsider: Liability for his acts resulting in loss: Fraud: Pleading.

1. A county board has no power to appoint as a member of a committee thereof a person not a member of the board.
2. One not a member of the county board who is appointed to act on a committee thereof is a mere volunteer, having no official authority.
3. One who undertakes without compensation to act with a committee and assist a county board in negotiating the sale of county bonds is not liable to the county for loss caused by an honest mistake in judgment.
4. In law every intendment that harmonizes with honesty and fair dealing must be presumed in the light of the alleged facts.
5. A mere averment in a pleading that acts and omissions were fraudulent adds nothing to the pleading, nor does it change the essential character of such acts and omissions.
6. A complaint alleging that defendant, not a member of the county board, was appointed and served on its committee to negotiate the sale of county bonds to the best and highest bidder; that two bids for the bonds were received, the lower of which was accepted; that defendant controlled the action of the committee and, through fraud and corruption on his part and by collusion with the bidder, induced acceptance of such lower bid, thereby causing pecuniary loss to the county; but that the details and character of such corruption, fraud, and collusion are to the plaintiff unknown—does not state facts showing that defendant committed a fraud in the transaction, and hence states no cause of action.

APPEAL from an order of the circuit court for Forest county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The complaint in this action is as follows:

"The complaint of the plaintiff, by A. C. Umbreit, district attorney for *Forest County,* for cause of action against the above named defendant, alleges:

"First. That, at all the times herein stated, the plaintiff was and now is a body corporate, organized as a county and political subdivision of the state of Wisconsin.

"Second. That, on or about the 23d day of September, 1908, the board of supervisors for *Forest County,* by resolution then and there duly adopted, decided and determined to build and erect a new court house for said county, and decided and determined that the bonds of the county, known as court-house bonds, be issued in the sum of fifty-five thousand ($55,000) dollars, for the purpose of furnishing money for the building of said new court house, and, by said resolution so duly adopted, appointed a committee of three, known as the bonding committee, and authorized and empowered said committee to negotiate, sell, dispose of and deliver said new court-house bonds, and to act in the negotiating, selling, disposing of and delivering of said bonds, on and in behalf of said board of supervisors, and, by said resolution so duly adopted, directed and commanded that said committee negotiate, sell, dispose of and deliver said bonds to the highest and best bidder therefor, and, by said resolution so duly adopted by said board of supervisors, the said defendant, *Samuel Shaw,* J. P. Libby and H. R. Messer were duly appointed such bonding committee, and, by such appointment, were directed and commanded to represent the said board of supervisors and the said plaintiff, in the matter of negotiating, selling, disposing of and delivering said bonds, for the building and erection of said new court house; that said J. P. Libby and said H. R. Messer were then and there members of said board of supervisors, and the said defendant, *Samuel Shaw,* was not a member of said board of supervisors, but accepted said appointment, and agreed and undertook to act for and represent said board of supervisors as a member of said bonding committee; that said J. P. Libby died before the commencement of this action, and that said H. R. Messer left the state of Wisconsin, and removed to a distant part of the United States, previous to the commencement of this action, and the present residence of H. R. Messer is to this plaintiff unknown.

"Third. That, after the appointment of said defendant as a member of said bonding committee, and during all the time said bonding committee was in existence, and acted and assumed to act as the agent and representative of said board of supervisors, the said defendant dominated and controlled the said committee, directed and determined the action of said committee in the matters submitted to it by the said board of

supervisors, and all action taken by said committee, within its jurisdiction, was caused to be so done by the said defendant.

"Fourth. That, after the appointment of said committee, and the said defendant as a member of said committee, on or about the 23d day of September, 1908, the said committee duly met on said 23d day of September, 1908, and the said meeting adjourned to the 24th day of September, 1908, at which date the said committee organized by electing a chairman and secretary, and the said meeting, on said day, determined to address, by letter, a large number of bonding houses, that is persons, corporations and partnerships dealing in municipal bonds, by purchasing them from municipalities, and offering them to the public for sale, requesting said bonding houses so addressed to offer bids for the purchase of said $55,000 of the bonds of *Forest County,* for the building of the new court house, and known and designated as court-house bonds.

"Fifth. That, at the meeting of said bonding committee held on the 3d day of October, 1908, the bids received for the purchase of said court-house (bonds) were opened, inspected and examined, and said committee had received in response to requests for bids for the purchase of said court-house bonds two bids from bonding houses, to wit, one bid from Thomas J. Bolger Company of Chicago, Illinois, which bid is hereto attached, marked Exhibit 'A' and made a part of this complaint, and another bid from the Harris Trust & Savings Bank of Chicago, Illinois, a copy of which bid is hereto attached, marked Exhibit 'B' and made a part of this complaint, to which said bid of said Harris Trust & Savings Bank was attached a proposed form of bond, and also a certified check in the sum of five hundred fifty ($550) dollars, payable to the order of the county treasurer of *Forest County;* that on said 3d day of October, 1908, the said committee, dominated and controlled, as aforesaid, by the said defendant, accepted the bid offered and submitted by the Thomas Bolger Company on the ground that said committee considered the said bid the best offer and approved said bid, together with the conditions therein named, notwithstanding the fact that the bid submitted by the Harris Trust & Savings Bank offered to pay the said county in purchasing said bonds the sum of three thousand three hundred twenty-five ($3,325)

dollars as a bonus and premium, whereas the bid submitted by the Thomas J. Bolger Company offered to pay but par for said bonds and to pay but five thousand ($5,000) dollars on the delivery of said bonds and retaining fifty thousand ($50,000) dollars to be paid on demand as might be required as the work of building said court house proceeded, and that said committee, influenced and directed by said defendant, in rejecting the bid of the Harris Trust & Savings Bank, and accepting the bid of the Thomas J. Bolger Company, wilfully and without excuse sacrificed the interests of this plaintiff, and caused the said county to lose the said sum of three thousand three hundred twenty-five ($3,325) dollars.

"Sixth. That the action of the said bonding committee, induced and caused by the said defendant, in accepting the bid of the said Thomas J. Bolger Company for the said court-house bonds, and in rejecting the bid of the Harris Trust & Savings Bank, was in utter disregard and in violation of the said resolution duly adopted, directing and commanding the said committee to negotiate, sell, dispose of and deliver said court-house bonds to the highest and best bidder therefor, and said committee and this defendant, in so acting, utterly disregarded the said resolution of said county board, and the acceptance of the said bid of the said Thomas J. Bolger Company was a disobedience of the commands of the said board of supervisors contained in said resolution, and in violation of the trust imposed in said committee and in said defendant, by the said board of supervisors, the violation of which said trust by said committee and by this defendant caused the loss to this plaintiff of said sum of three thousand three hundred twenty-five ($3,325) dollars, the bonus or premium so offered by the said Harris Trust & Savings Bank for said court-house bonds.

"For a second and separate cause of action the plaintiff alleges:

"First. That the plaintiff refers to and alleges all the allegations of the foregoing first cause of action, as far as applicable hereto; and

"Second. That the acceptance of the bid of the said Thomas J. Bolger Company, for the said court-house bonds, by the said bonding committee, was induced by the said defendant, while a member of said committee, through fraud and corruption on the part of the said defendant, and by collusion

with one W. H. H. Cash, then and there representing the said Thomas J. Bolger Company, as plaintiff is informed and verily believes, and that the details and character of such corruption, fraud and collusion are to this plaintiff unknown; and that the said defendant, controlling and directing the action and the proceedings of said bonding committee as aforesaid, induced the said committee to record in its minutes of the proceedings had by it, by indorsing below and at the foot of the bid filed by the said Thomas J. Bolger Company the following: 'The above proposition being considered the best offered is hereby accepted and approved, together with the conditions therein named. Dated at Crandon, Wisconsin, this 3d day of October, A. D. 1908,' and induced and procured the other members of said building committee to sign said indorsement, together with himself; that the said defendant concealed from said board of supervisors of said *Forest County* the fact that, although he induced said committee to indorse and accept the bid of said Thomas J. Bolger Company, as the best bid offered, that said bid was not the highest bid, and that, by accepting the said bid of the said Thomas J. Bolger Company, the said plaintiff was defrauded out of the said sum of three thousand three hundred twenty-five ($3,325) dollars; that the action of the said defendant in so controlling the said bonding committee and inducing said committee to accept the bid of said Thomas J. Bolger Company was wilful, fraudulent and corrupt, resulting in damage to the said plaintiff in the said sum of three thousand three hundred twenty-five ($3,325) dollars.

"Wherefore plaintiff demands judgment against the defendant for the said sum of three thousand three hundred twenty-five ($3,325) dollars, together with interest thereon from the 3d day of October, 1908, and for the costs and disbursements of this action."

The exhibits attached to the complaint are as follows:

"EXHIBIT 'A.'

"Crandon, Forest County, Wisconsin,
"October 3, 1908.

"To the Bonding Committee for the County Board of Forest County, Wisconsin:

"GENTLEMEN: For your $55,000 county court-house bonds, dated October 1, 1908, maturing $5,000 April 1, 1910, and

$5,000 maturing on April 1st in each year thereafter, until all are paid, said bonds to bear interest at the rate of six per centum per annum, payable annually, both principal and interest payable at Crandon State Bank of Crandon, Wisconsin, said bonds to be delivered at Chicago, Illinois, we will pay you par $55,000, and accrued interest, $5,000 to be paid on delivery of bonds, the remaining $50,000 to be paid on demand, 2 per cent. on daily balance to be allowed as may be required as the work of building said court house proceeds.

"As an only condition to this contract, your county board shall pass a resolution prescribing the form of bonds and interest coupons and manner of execution, and levy a direct annual tax upon all taxable property in the county, sufficient to pay the principal and interest when due (the forms for which we will furnish). You will also furnish us statements of amount of taxes levied for current year, to pay administrative expenses (section 1074, R. S. Wisconsin, as amended by ch. 430 of the Laws of 1907), also proof that the county clerk mailed notices of special meeting for September 23, 1908, to each member of your county board (section 664, R. S. Wisconsin Statutes of 1898); that proceedings of your county board at said special meeting of September 23, 1908, and resolution adopted thereat were published in conformity with the provisions of section 674 of the Wisconsin Supplement of 1906; that the resolution was adopted pursuant to the rules and by-laws of the county board, furnishing us with copy (certified) of all rules and by-laws relative to the calling and holding of meetings and manner of transacting business thereat, including introduction, reading, reference, passage and adoption of ordinances, resolutions, etc.

"THOMAS J. BOLGER COMPANY,
"153 La Salle Street,
"By W. H. H. Cash, Agent."

"EXHIBIT 'B.'

"C. J. Himley, Secretary Bonding Committee, Forest County, Wis.:

"DEAR SIR: For the $55,000 court-house bonds to be issued by your county, being bonds of the denomination of $1,000 each, dated Oct. 1, 1908, due $5,000 annually April 1, 1910 to 1920 inclusive, all other detail as per inclosed form of bond, we will pay you upon delivery of the bond to us in Chicago the sum of $58,325, and interest.

"We will also furnish blank bonds free.

"As evidence of our good faith we attach hereto certified check in the sum of $550, payable to the order of the county treasurer of *Forest County,* Wis., said check to be held by you and used as part payment for the bonds if awarded and delivered to us under the terms of the contract, otherwise to be returned to us.

"Respectfully submitted,

"HARRIS TRUST & SAVINGS BANK,

"By H. W. Chapman."

The defendant demurred to the complaint upon the grounds that there was a defect of parties, in that the other members of the bonding committee were not joined with the defendant as codefendants; that several causes of action were improperly united; that the complaint failed to state facts sufficient to constitute a cause of action; and that the action was not commenced within the time limited by law under sec. 4224, Stats. (1898).

The court overruled the demurrer, and the defendant appeals from the order overruling the demurrer.

Samuel Shaw, appellant, in person.

A. C. Umbreit, special counsel, and *John F. Hooper,* district attorney, for the respondent.

SIEBECKER, J. The complaint discloses that the pleader sought to charge that the defendant, as a member of the committee to negotiate for the sale of the county's bonds, which had been issued by the county to enable it to secure the necessary financial means to construct a county court house, committed a wrong which caused the county pecuniary injury. The allegations of the complaint, though indefinite and general in essentials, permit of the conclusion that the pleader purposed to state causes of action for the wilful misconduct of the defendant pertaining to transactions of the bonding committee, and that the county's financial interests were thereby wilfully sacrificed in the amount alleged. The de-

murrer challenges the sufficiency of the complaint, upon the ground that the facts alleged do not constitute a cause of action against the defendant. The contentions of the plaintiff in support of the claim that the facts alleged state good causes of action against the defendant are grounded on the idea that the defendant was a member of the bonding committee by acting with such committee, and, for this occasion, he was in fact an officer of the county and liable as such. Counsel conceded that the law providing for the appointment of committees by county boards confers authority to appoint on such committees only members elect of the county board. That such is the authority conferred by sec. 668, Stats. (Laws of 1907, ch. 14), is plain. The complaint alleges that the county board by resolution appointed a committee of three, known as the bonding committee, and authorized and empowered such committee to negotiate, sell, and deliver the county bonds for the county board to the highest and best bidder therefor; that the county board appointed two of its members and the defendant, who was not a member of such county board, members of said committee; and that the defendant accepted the appointment and acted with the two members of the board so appointed. The question is: Does this show that he was a county officer while he was acting for the board in carrying out the objects of the resolution? To make him an officer of the county it is necessary that he fill an office. It is claimed that the creation of the committee by the county board was an act within the authority conferred by sec. 668, Stats., and that membership thereof constituted him an officer of the county for the purposes of the authority delegated to them. True, the persons who carried out this bond transaction acted for the county board in a matter the board could delegate to a committee of its members under sec. 652, Stats. (1898). See *French v. Dunn Co.* 58 Wis. 402, 17 N. W. 1. A properly constituted committee of members of the county board could act only as an agency of the county board to execute and per-

form a duty of the board. This, however, can only be lawfully done by a committee composed of board members, and no power or authority existed to appoint the defendant a member of such a committee. The result is that no authority was conferred on the defendant as a member of such a committee; nor was he invested with any power to perform a function of the county board. Since he was not a member of the county board he was wholly outside the field of official action in this transaction. Under the existing law it is only by virtue of membership of the county board that members of a committee thereof can be considered as acting in an official capacity for the county in conducting its affairs. Under such circumstances, defendant's participation in the transaction of selling the bonds was that of a volunteer having no official authority. These conditions preclude the inference that a liability of the defendant can be predicated upon the grounds presented by the plaintiff's counsel, namely, that he was a *de facto* officer of the county. As we have seen, he held no office, because membership of such a committee refers back to membership in the county board.

The question then arises: Do the facts alleged constitute a cause of action against the defendant in his individual capacity? The facts alleged tend to show that the defendant undertook, without compensation, to aid the county board in negotiating the sale and delivery of the county bonds to the "highest and best bidder" therefor; that he acted in conjunction with two members of the board in this transaction for the sale and delivery of the bonds to the appropriate bidder, whose bid for the purchase of the bonds was presented pursuant to letters sent out by the defendant and the members of the board associated with him, inviting parties to submit bids to them for the purchase of the bonds; that he and the two members of the board accepted the bid by which it is alleged the county realized $3,325 less than the amount the county would have realized by accepting the other bid submitted to

them; and that the defendant controlled the other members of the alleged committee, fraudulently and corruptly induced them to report to the county board that the accepted bid was the best offer received by them for the purchase of the bonds, and he concealed from the members of the board the fact that it was not the best bid. It is alleged generally that the defendant acted collusively and fraudulently in the matter but that the details of such wrongful conduct are unknown to the plaintiff. "The averments of the pleader stigmatizing them as fraudulent adds nothing to the pleading, nor does it change the essential character of the acts and omissions." *Herbst v. Land & L. Co.* 134 Wis. 502, 115 N. W. 119, and cases cited. This court in the case of *Nelson v. C., M. & St. P. R. Co.* 60 Wis. 320, 19 N. W. 52, declared the rule to be:

"Whoever bargains to render services for another, undertakes for good faith and integrity, but he does not agree that he will commit no errors. For negligence, bad faith, or dishonesty he would be liable to his employer, but, if he is guilty of neither of these, the master or employer must submit to such incidental losses as may occur in the course of the employment, because these are incident to all avocations, and no one, by any implication of law, ever undertakes to protect another against them."

See, also, *Noble v. Libby,* 144 Wis. 632, 129 N. W. 791.

"A general charge that a party acted fraudulently, falsely, or wrongfully, or that he made fraudulent representations or statements, amounts to nothing; there must be a specification of facts to justify it. It is at most but a mere inferential statement, too vague and uncertain to apprise the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it, or to inform the court whose duty it is to declare the law arising upon the facts." *Kewaunee Co. v. Decker,* 30 Wis. 624.

See, also, *Pietsch v. Krause,* 112 Wis. 418, 88 N. W. 223; *New Bank v. Kleiner,* 112 Wis. 287, 87 N. W. 1090; *Riley v. Riley,* 34 Wis. 372.

Applying these rules to the allegations of the complaint, we find that there are no facts alleged to show fraud. The only fact which can be claimed to show that the defendant and his associates did not secure the best results for the county in selling the bonds is that the bid accepted apparently brought a return of $3,325 less than the other bid would have brought. But the complaint wholly fails to allége any of the conditions incident to the rejected bid, as shown by the exhibits attached to the complaint, which might show that the accepted bid was the better bid, though on its face the money return was apparently less than from the one rejected. Further, there is no fact alleged that impeaches the good faith and honesty of the defendant in believing the bid accepted to be a better bid for the county's interest than the rejected one. In law every intendment that harmonizes with honesty and fair dealing must be presumed in the light of the alleged facts. The action of the defendant and his associates may be fully explicable on the ground of an honest mistake in judgment, in so far as the alleged facts show, for which no liability for pecuniary loss under such circumstances attaches. We are persuaded that the complaint is wanting in facts showing that the defendant committed a fraud in the alleged transaction of the bond sale. Hence it states no cause of action against the defendant, and the demurrer should have been sustained.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to the court to sustain the demurrer to the complaint.

COLLINS, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

May 15—June 4, 1912.

Railroads: Negligence: Injury to employee of contractor: Rebuilding operations: Right of construction crew to use trestle: Contributory negligence: Evidence: Instructions to jury.

1. In an action for injuries to a carpenter employed by a construction company in rebuilding a railway bridge or trestle, who was struck and injured by a construction train which, on a foggy morning, was backed in upon the trestle with unusual speed and without having given any signal or warning of its approach, the questions whether the railway company was negligent in the running of such train and whether plaintiff, after having looked and listened for the train, which was expected, was negligent in attempting to pass from one end of the trestle to the other on a board walk which had been laid between the rails for the use of the concrete workers, instead of going beneath the structure, are *held*, upon the evidence, to have been questions for the jury.
2. Although the walk over the trestle was laid for use by the concrete workers, yet all the members of the construction crew having been invited to use it in all matters in which it would facilitate their work, if the railway company should have anticipated injury to any person by reason of the way in which it ran the train in question its responsibility is not affected by the fact that it was a carpenter, not a concrete worker, who was injured.
3. Evidence relative to the usual mode of rebuilding bridges on a line of railway in operation, and to the mode of conducting the work at the time and place in question, was admissible in such case to aid in understanding questions of want of ordinary care.
4. A requested instruction to the jury which is confused and unintelligible may properly be refused.
5. Under the circumstances stated, it was a question for each workman to determine in the exercise of ordinary care and prudence when to use the walk and to what extent and for what purposes connected with the construction work it should be used; and a requested instruction to the jury to the effect that plaintiff had no excuse for being on the trestle unless his presence there was absolutely necessary in the proper prosecution of the work in which he was engaged, was properly refused.

APPEAL from a judgment of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

In this case there was a special verdict as follows:

"(1) Was the whistle of the engine on the train which struck the plaintiff blown after the train was within such reasonable distance of the bridge where the plaintiff was injured as ought to have warned those at work on or about the bridge of the approach of the train? *A.* No.

"(2) Was the train which struck the plaintiff running at the rate of speed at which trains customarily approached and crossed the bridges on which the plaintiff had been at work? *A.* No.

"(3) Was the conductor on the top of the caboose at the time the train approached and crossed the bridge at which plaintiff was injured? *A.* Yes.

"(4) Did the defendant use ordinary care in the operation of its train on approaching the bridge at the time plaintiff was injured? *A.* No.

"(5) If your answer to any or all of the preceding questions be 'No,' was such course of conduct on the part of the agents and employees of the defendant the proximate cause of plaintiff's injury? *A.* Yes.

"(6) Was there any want of ordinary care on the part of the plaintiff that contributed to produce his injuries? *A.* No.

"(7) What sum will compensate the plaintiff for the injuries which he sustained? *A.* $3,000 (three thousand dollars)."

Error is assigned and argued in rulings admitting and rejecting evidence, in refusing and giving instructions to the jury, and in refusing to grant a nonsuit and to direct a verdict for defendant.

Daniel H. Grady, for the appellant.

D. W. McNamara, for the respondent.

TIMLIN, J. The plaintiff was an employee of the Bates & Rogers Construction Company, which under contract with defendant was engaged in reconstructing bridges upon defend-

ant's line of railroad. On September 27, 1909, this construction company was thus engaged upon a bridge on the main line of the railroad where it crossed a low, wet place or slough. The structure, in the testimony sometimes called a bridge and sometimes a trestle, was about eighty feet long and eight to ten feet above the surface of the low land and water at the bottom. The operation of trains on the road continued and a construction train in aid of repairs backed in over the trestle every morning. The trestle, with the apparent consent of defendant, was used by a gang of Bates & Rogers men, who placed their mixing boards or boxes for mixing the concrete at the east end of the trestle to one side and on a level with the rails, their tool box at or near the same place, and laid a board or plank walk upon the ties between the rails and extending from one end of the trestle to the other. They also built what witnesses called a cofferdam and forms for the concrete. These structures extended down between the ties from the track into the excavations at the bottom. They moved material to the mixing boxes, mixed it making concrete, and put this in wheelbarrows and wheeled it along the board or plank walk to the forms or receptacles and dumped it into the latter. This bridge crew consisted of concrete mixers and wheelbarrow men and carpenters and perhaps some others. The carpenters laid the board walk, built the cofferdams and forms where required, and stripped them or took them apart when necessary. At the bottom of the trestle there was water in places two feet deep and the place was strewn with *débris* from the rebuilding operations. The ordinary trains approaching on the road signaled and either stopped or slacked up before reaching the bridge work, the workmen got out of the way, and the train then passed slowly over. The construction train, consisting of a locomotive, tender, and several freight cars, the last one open at the end and equipped with what is known in railroad work as a "tail-hose," backed in every morning, somewhat irregularly as regards

time, for the purpose of delivering material to the bridge crew. It signaled its approach by the usual locomotive whistle and also by the "tail-hose," which is connected with the compressed air chamber of the air brake and makes a sound something like an automobile horn. It is said, but how accurately we do not know, that this can also be used to set the air brakes on the last car. In any event the practice was for the construction train to back in slowly after giving signals. The workmen were expected, of course, to be on the track but to keep out of the way of trains. This is in general the way in which all bridge work on operating roads is done. The concrete men could not do their work without going on the track and using this board walk. Aside from their work in laying the walk and that upon the upper end of the forms the carpenters could work below the trestle. The carpenters going from the west end of the board walk could reach the tool chest by traveling on the surface of the slough below the trestle and ascending at the east end to where the tool chest was, or they could reach the tool chest over the board walk. At the time in question the morning was foggy, and the plaintiff, who was a carpenter and engaged in doing carpenter work in the trestle below its surface and at the west end of the board walk, completed that work, and his duty required him to put his tools in the tool box and get others appropriate for further and different work. He came up to the track, looked and listened for an approaching train, for he knew it was about time for the construction train. Seeing and hearing nothing he proceeded along the board walk eastwardly toward the tool box, carrying a heavy hammer and a bar and wearing heavy rubber boots. When he had gone about forty feet or half way to the tool chest, his fellow workmen saw the construction train appearing out of the fog about 150 feet west of the trestle and called to plaintiff. He heard them, took one look back, saw the approaching train, threw away his tools and started on a run, but before he reached the mixing

boxes, where he would find his first chance to leave the track, unless he jumped from the trestle, the train ran him down and injured him just as he reached and was about to step over into the mixing boxes. The train backed in with unusual speed without any man at the tail-hose and without signal or warning. Such is the case as disclosed by the evidence, assuming that the verdict of the jury requires us to accept the testimony and inferences therefrom most favorable to support the verdict.

On the question of nonsuit the appellant's contention seems to be that the plaintiff was a trespasser on the bridge or trestle because he might have reached the tool box by the other route and should have done so when he had occasion to go to the tool box at or about the time of the approach of the construction train. We consider this position untenable. The invitation to use this board walk was plainly extended to all the employees of the construction company in all matters in which its use would facilitate their work. There was no distinction observed between carpenters and other members of the crew so far as regards the use of this board walk. It was a matter of judgment, a question of the exercise of ordinary care on the part of the plaintiff, whether he should take the route to the tool chest over the board walk or the route under the trestle. Neither route was without its dangers and difficulties. Similar considerations apply to the contention that the plaintiff should not have used the walk on the trestle at such time when the construction train was expected to arrive. He looked and listened for the train and, hearing and seeing nothing to indicate its near approach, he undertook to cover the short distance between him and the tool box. In doing so he apparently had a right to rely upon the usual signals being given and the train backing in at the usual speed. These conditions, we think, presented questions of fact bearing on the contributory negligence of plaintiff. The appellant erroneously assumes that they give rise to legal rules which abso-

lutely fix the contributory negligence of plaintiff. We think the question of plaintiff's negligence in using the board walk at the time, in the manner, and for the purpose he did, was for the jury and is settled by the sixth question of the special verdict. On the question of defendant's negligence the case was clearly for the jury. Some argument is made that because those in charge of the construction crew had no ground to anticipate that the carpenter members of the construction crew would be using this walk there was a failure of proof of defendant's negligence, because as to them the carpenters were as trespassers. We cannot approve of this reasoning. If the defendant should have anticipated injury to any person on account of backing in at an excessive speed on a foggy morning without the usual signals, that was enough to stamp the act as negligent, and it cannot escape the consequences merely because a carpenter instead of a concrete worker was the one injured.

There was no error in admitting testimony relative to the usual mode of rebuilding the bridges on a line of railroad in operation nor in relation to the mode of conducting the work at the time and place in question. This is not a question of custom nor is it governed by the law of custom. Popularly, custom may be used as a synonym for mode or practice, but in law a custom means something else. Great liberality is allowed in the introduction of evidence relating to the mode or practice of carrying on the work in question or somewhat similar work. Such evidence was very proper to aid the jury in understanding questions of want of ordinary care.

We do not think the court excluded evidence offered by the defendant tending to show that the mode or practice was to remain entirely off the bridge at or about the time when a train was due. We find no such evidence rejected and no such ruling. The question relating to the impeachment of the witness Benning to which our attention is called, cannot have any such scope. There was no error in excluding ques-

tions on cross-examination of plaintiff asking him whether he had subpœnaed a certain named person as a witness and whether he knew that this person would be a witness. The defendant requested the court to instruct the jury that, "in determining whether plaintiff had a right to be on such trestle, you are instructed that it is not enough to show the existence of such right, that he believed such use was intended. It must further appear that he brought home to defendant by acts and conduct affording reasonable grounds for such belief, and he must show, either that the trestle which was to be used for the purpose for which he was using it, under the arrangement with the contractor for whom he was working, or that the circumstances were such that such use might be reasonably inferred from such arrangement." This was very properly rejected as confused and unintelligible. It is said to have the support of *Furey v. N. Y. C. & H. R. R. Co.* 67 N. J. Law, 270, 51 Atl. 505. Even if this were so, precedent cannot establish clearness in language which itself unmistakably indicates confusion of thought. Neither was it proper to instruct the jury that the plaintiff had no excuse for being on the trestle unless his presence there was absolutely necessary in the proper prosecution of the work in which he was engaged. This is too absolute and excludes considerations of ordinary care. If there was an invitation, express or implied, extended to all of the bridge construction crew to use this trestle in their work, but to keep out of the way of passing trains, this left it a question for each workman to determine, in the exercise of ordinary care and prudence, when to use this walk, to what extent and for what purposes connected with the construction work it should be used. Persisting in its use unnecessarily or in the presence of an approaching train, when the approach was known to the workman or in the exercise of ordinary care ought to have been known to him, would no doubt be such contributory negligence as would preclude recovery. But under the facts here it would be impos-

sible to say as matter of law that workmen must suspend all operations and wait for the uncertain arrival of the construction train and not continue at their work relying on the usual signals and upon its approach in the usual manner. Cases cited by appellant relating to persons going on a bridge or trestle on a railroad track who are not invited or permitted to do so by the railroad company and when their presence there is unnecessary are not in point.

Other questions are argued and have been considered but they are covered by what has been said. We are compelled to disagree wholly with appellant's theory of this case, consequently its exceptions to the admission of evidence, to the refusal of instructions, and to the instructions given are unavailing.

By the Court.—Judgment affirmed.

CASES DETERMINED

AT THE

August Term, 1912.

STATE vs. LAW.

May 18—September 20, 1912.

Abortion: Evidence: Dying declarations: Coercion or inducement: Instructions to jury: Physicians and surgeons: Privilege: Experts: Competency: Statutes construed: Relevancy of testimony.

1. No reasonable request for a statement of the circumstances under which a mortal injury was inflicted, and no reasonable or proper insistence upon such statement where such insistence is essential to diagnosis by a physician or as a protection against prosecution, will be sufficient to exclude a dying declaration.
2. Thus, a dying declaration in which a woman charged defendant, a physician, with having attempted an abortion was not rendered incompetent by the fact that another physician, called to treat her when she was in a dangerous condition, had refused to do so until he procured from her a full history of the case, either to enable him to treat her or for his own protection.
3. Instructions given to the jury with reference to such a dying declaration and the weight and credit to be given it, by which the jury were allowed to pass upon the mental capacity of the declarant and the question whether her declaration was made freely and voluntarily, are approved.
4. Whether sec. 4075, Stats. (Laws of 1911, ch. 322 and ch. 664, sec. 44), is applicable to criminal cases, not determined. BARNES and SIEBECKER, JJ., are of opinion that it is applicable.
5. Sec. 4078*d*, Stats. (Laws of 1905, ch. 149),—providing that "no person shall be excused or privileged from testifying fully under oath in any prosecution brought under" secs. 4352 or 4583, Stats. (1898), and providing for immunity of the witness from

prosecution for any transaction so testified to,—takes away, in the cases specified, not only the privilege against self-incrimination, but also the professional privilege of a physician accorded by sec. 4075, Stats. BARNES and SIEBECKER, JJ., dissent.

6. Sec. 1436, Stats. (Laws of 1903, ch. 426, sec. 8),—providing that "no person practicing medicine, surgery, or osteopathy shall have the right . . . to testify in a professional capacity as a physician or surgeon or insanity expert in any case, unless he or she holds a license," etc.,—does not preclude experts in bacteriology, biology, embryology, etc., from testifying as such, where they are not persons practicing medicine, surgery, or osteopathy and do not testify in a professional capacity as physicians, surgeons, or insanity experts.

7. Where a woman upon whom defendant is alleged to have attempted an abortion stated in a dying declaration that her sickness followed the removal of a tube alleged to have been inserted by defendant in her uterus, but did not say that such sickness, to the point of disability, followed immediately upon such removal, and it appeared that the severe or acute sickness did not set in until three days later, evidence that her husband had sexual intercourse with her during that interval was irrelevant and inadmissible to contradict her dying declaration.

EXCEPTIONS from the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Overruled.*

Exceptions allowed under sec. 4720, Stats. (1898), to review the rulings of the circuit court for Dane county made in the above entitled action. The information is as follows:

"I, Robert N. Nelson, district attorney for said Dane county, hereby inform said court that *A. R. Law* did on the 19th day of July, 1911, at the city of Madison, in said county, wilfully and feloniously employ upon the body and womb of Annie O'Brien, being then and there pregnant with a child, a certain instrument, to wit, a rubber tube commonly called a catheter, with intent thereby then and there wilfully and feloniously to destroy such unborn child, the same not being necessary to preserve the life of such mother, the said Annie O'Brien, and not having been advised by two physicians to be necessary for the purpose of preserving the life of such mother, the said Annie O'Brien, by means whereof the death of the said Annie O'Brien was produced and whereby the

said *A. R. Law* did on the 26th day of July, 1911, feloniously kill and slay the said Annie O'Brien, against the peace and dignity of the state of Wisconsin."

The statute defining the offense is sec. 4352, Stats. (1898).

Assignments of error:

1. The court erred in admitting in evidence the alleged dying declaration of Annie O'Brien taken down in typewritten form.

2. The court erred in admitting in evidence the testimony of Robert N. Nelson as to the alleged oral dying declaration of Annie O'Brien.

3. The court erred in admitting in evidence the testimony of Deborah Richter as to the alleged oral dying declarations of Annie O'Brien.

4, 5, 6, and 7. The court erred in admitting as evidence the testimony of Drs. Joseph Dean and Joseph P. Donovan relative to privileged communications, and also relative to other things, as experts.

8, 9, and 10. The court erred in permitting C. R. Bardeen, C. H. Bunting, and M. P. Ravenel to testify as experts, because there was no proper proof of their qualifications.

11 and 12. The court erred in excluding the testimony of Jerre O'Brien.

The foregoing presents an abbreviated statement of the exceptions and assignments of error which are formally set forth in the record.

For the state there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, *F. L. Gilbert,* special counsel, and *Robert N. Nelson,* district attorney; and the cause was argued orally by *Mr. Nelson, Mr. Jackson,* and *Mr. Gilbert.*

For the defendant there were briefs by *Richmond, Jackman & Swansen* and *Rufus B. Smith,* and oral argument by *Mr. T. C. Richmond* and *Mr. Smith.*

With reference to the first, second, and third assignments of

error counsel for defendant cited: *State v. Carter,* 107 La. 792, 32 South. 183; 4 Ency. of Ev. 933, 939, 945, 946; *State v. Jessewell,* 22 R. I. 136, 46 Atl. 405, 407; *McHugh v. State,* 31 Ala. 317, 320; 1 Greenl. Ev. § 156; *People v. Loper,* 159 Cal. 6, 112 Pac. 720; *People v. Barric,* 49 Cal. 342, 344; *People v. Thompson,* 84 Cal. 598, 605, 24 Pac. 384, 386; *Justice v. State,* 99 Ala. 180, 13 South. 658; *Comm. v. Casey,* 11 Cush. 417; *Ledbetter v. State,* 23 Tex. App. 247, 5 S. W. 226, 227; *State v. Banister,* 35 S. C. 290, 14 S. E. 678; *Maxwell v. State,* 40 South. 615; *State v. Roberts,* 12 N. C. 260; *Peter v. State,* 4 S. & M. 31, 37; *Deathridge v. State,* 1 Sneed, 75; *Stephen v. State,* 11 Ga. 225; *People v. Johnson,* 41 Cal. 452; Roscoe, Crim. Ev. (12th ed.) 41. Counsel for the state cited: 4 Ency. of Ev. 947, 979, 980; 2 Wigmore, Ev. § 1442; *State v. Cameron,* 2 Pin. 490; *Miller v. State,* 25 Wis. 384; *State v. Martin,* 30 Wis. 216; *State v. Dickinson,* 41 Wis. 299; *Richards v. State,* 82 Wis. 172, 51 N. W. 652; *Hughes v. State,* 109 Wis. 397, 85 N. W. 333; *Van Haltren v. State,* 142 Wis. 143, 124 N. W. 1039; *Novkovic v. State,* 149 Wis. 665, 135 N. W. 465; *Vass v. Comm.* 3 Leigh, 786; 1 Greenl. Ev. § 159.

In behalf of defendant there was cited in support of assignments of error 4, 5, 6, and 7 the following: Secs. 1436, 4075, and 4078*d,* Stats. (1898), with amendments; *People v. Murphy,* 101 N. Y. 126. In behalf of the state: *Hauk v. State,* 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Seifert v. State,* 160 Ind. 464, 67 N. E. 100; *State v. Grimmell,* 116 Iowa, 596, 88 N. W. 342; *Pierson v. People,* 79 N. Y. 424; *People v. Harris,* 136 N. Y. 423, 33 N. E. 65; *People v. West,* 106 Cal. 89, 39 Pac. 207; *People v. Griffith,* 146 Cal. 339, 80 Pac. 68; *State v. Height,* 117 Iowa, 650, 91 N. W. 935; *People v. Glover,* 71 Mich. 303, 38 N. W. 874; Jones, Ev. (2d ed.) § 761(779); 4 Wigmore, Ev. § 2385; 10 Ency. of Ev. 135; *People v. Benham,* 14 N. Y. Crim. Rep. 434.

In behalf of defendant there was cited in support of as-

signments of error 11 and 12: *Robinson v. Talmage,* 97 Mass. 171; *Litchfield v. Merritt,* 102 Mass. 520, 524; *Gosselin v. King,* 33 Can. Sup. Ct. 255, 277; *King v. Sassaman* (Tex. Civ. App.) 64 S. W. 937; *Polson v. State,* 137 Ind. 519, 35 N. E. 907; 2 Words & Phrases, 1342; *Hagerman v. Wigent,* 108 Mich. 192, 65 N. W. 756; *Estate of Van Alstine,* 26 Utah, 193, 72 Pac. 942; *Stanley v. Stanley,* 112 Ind. 143, 13 N. E. 261; *Comm. v. Cleary,* 152 Mass. 491, 25 N. E. 834; *Flora v. Anderson,* 75 Fed. 217; *Epstein v. Pennsylvania R. Co.* 143 Mo. App. 135, 122 S. W. 366. On the part of the state: *Smith v. Merrill,* 75 Wis. 461, 44 N. W. 759; *Aveson v. Kinnaird,* 6 East, 192; *Miller v. Miller,* 14 Mo. App. 418; *Comm. v. Sapp,* 90 Ky. 580, 14 S. W. 834, 29 Am. St. Rep. 405; 6 Ency. of Ev. 867, 903; 1 Greenl. Ev. § 337; *Goodrum v. State,* 60 Ga. 509; *U. S. v. White,* 4 Utah, 499, 11 Pac. 570; *Stanford v. Murphy,* 63 Ga. 410; *Berry v. Randall,* 83 Ind. 143, 23 Am. & Eng. Ency. of Law (2d ed.) 95.

The following opinions were filed June 4, 1912:

TIMLIN, J. The testimony offered on the part of the state tended to show that on Wednesday, July 19, 1911, the deceased, Annie O'Brien, a married woman, residing with her husband, consulted the accused, a licensed physician, in a professional capacity, informing him that she was about five weeks advanced in pregnancy and wished him to produce a miscarriage, and that defendant, by the use of an instrument for that purpose, inserted a tube in the uterus. On Thursday, the next day, she removed the tube, and following this (how soon not stated) she became sick. This happened a week before the day of her death, and she had been sick several days before her death according to her statement to the nurse, Richter. On the evening of July 25th the husband of deceased called Dr. Dean on the telephone, and the latter declined to go to O'Brien's house because he, Dean, was him-

self sick. He gave O'Brien the names of several other physicians whom the latter might call. Later that night O'Brien called personally at Dean's house, roused the latter, and told him that his wife had been to see Dr. Law, and gave such description of her condition as led Dr. Dean to suspect that something irregular had been attempted. Dr. Dean still refused to call and recommended O'Brien to get another doctor, and told the latter that on his way to the hospital in the morning he would call on Mrs. O'Brien. He did so, and found her in an advanced stage of peritonitis, her pulse and temperature indicating a dangerous condition, and found a bloody discharge from the vagina. Dr. Dean informed her that he would not take charge of her case unless she made a full statement to him concerning it. He insisted upon this, he says, to enable him to treat the case properly and also for his own protection. She made such statement and implicated the defendant as having, with her consent, attempted an abortion. Dr. Dean concluded the only way to save her life was to take her to the hospital and, by an operation, open the abdominal cavity and drain off the pus there apparently collected. She was taken to the hospital. Dr. Dean called in Dr. Donovan. It was found that the patient's condition was such that she failed to respond to ordinary heart stimulants, and this, together with other symptoms, convinced the doctors that an operation could not be safely performed, and also that the woman was *in extremis*. Knowing that she was about to die, she made a dying declaration, implicating the accused, to Deborah Richter, one of the nurses at the hospital. Dr. Dean informed the district attorney, who came to the hospital and took her dying declaration in the presence of the two doctors, Dean and Donovan, the nurse, and a lady stenographer, who afterwards wrote it out in typewriting. The woman died in the afternoon of that day, and an autopsy disclosed, according to the opinion of the physicians who conducted the same, that the cause of the death was acute peri-

tonitis originating in the uterus and spreading from thence to the Fallopian tubes and thence to the peritoneum generally.

The accused took the stand in his own behalf and testified that Mrs. O'Brien called at his office for medical treatment on Wednesday, July 19th, about 10:30 o'clock in the morning, and complained of a pain in her right side, which she had felt for a year or two before. When she got into the private office for the purpose of having an examination made relative to this pain in her side, she informed the accused that she had passed her menstrual period two or three days and wished him to ascertain whether she was pregnant. He placed her upon an operating table, found a soreness over the right ovary, and found she was not pregnant. He gave her an emmenagogue and some salacetin tablets and she left. There was no request that he produce a miscarriage and nothing was inserted in the uterus. He heard nothing from her until Sunday evening, following, between 7 and 8 o'clock, when he received a telephone call from Mr. O'Brien requesting him to come and see his wife, because the pain in her side was worse. He went there and was informed that the pain had subsided, and that the tablets he had given on Wednesday had brought about menstruation, and he came away without giving medicine or treatment of any kind. There were others present all the time. On Monday evening he was again called by telephone and he arrived at the O'Brien house between 7 and 8 o'clock. He found Mrs. O'Brien quite a sick woman, temperature 101½, pulse up near 100, respiration and heart action bad, and she complained of pain in her side extending across the abdomen. The abdomen was swollen or puffed up and there was tenderness to the touch. He washed out the uterus with hot water and alcohol, her husband holding the lamp for him. The fluid returned clear and without odor. He left some instructions, promised to come in next day, was prevented by something, and Tuesday evening Mr. O'Brien again called him by

telephone, and he came and found Mrs. O'Brien very sick; temperature 104½, pulse about 150, abdomen swollen, distended, and sensitive to the touch, respiration rapid, short, and labored, like one in distress. He told two women who were in the house and also told Mr. O'Brien he did not think there was any chance for Mrs. O'Brien to get well, but she might live a little while, a day or so. He prescribed some fat-free tincture of digitalis and said to Mr. O'Brien: "If your wife is alive in the morning let me know and I will come down again." In the morning, about 7 o'clock, Mr. O'Brien told him that they had engaged Dr. Dean.

1. It is contended that the refusal of Dr. Dean to treat the patient until he procured from her a history of the case, either to enable him to treat her or in his own protection, was such coercion of the patient or such inducement as to render incompetent not only what she then and there told Dr. Dean, but all dying declarations thereafter made by her at the hospital to the same effect and under the same influence. It is argued that, having this origin, the dying declarations were tainted, no matter how frequently repeated thereafter, because of the nature of the inducement held out, the feeble condition of the declarant, and because it is shown by evidence that a person in this advanced stage of peritonitis, when septicemia has already set in, is not sufficiently conscious or intelligent to make a competent dying declaration. If the testimony relating to her mental condition were without dispute, and if the statement made to her by Dr. Dean was plainly a threat or inducement for her to make a charge against the accused, and it appeared she was still in that condition when she made the dying declarations and still laboring under the duress or inducement of what Dr. Dean said to her, it would have been the duty of the trial court to exclude the dying declarations. But that was not the case. The statement of Dr. Dean did not suggest that she charge the accused with any crime. It was a very proper request

for him to make under the circumstances. It probably had influence in inducing her to make disclosure and to tell the truth. But that was merely incidental, and a charge against the accused was not the direct result of the request at all in case the accused had done nothing wrong or criminal. Several witnesses who saw, and talked with, Mrs. O'Brien at the hospital prior to and at the time of the dying declarations testified to her mental competency in no uncertain language. Under such circumstances the trial court would not be justified in excluding the dying declarations, but very properly admitted them in evidence, instructing the jury concerning the same as follows:

"In considering the statements made by Mrs. O'Brien on the day of her death, you should consider the fact that dying declarations constitute an exception to the general rules of evidence. They are in the nature of hearsay or second-hand evidence, and although for reasons of public policy, as well as because of the difficulty of obtaining better proof of the fact, they are under certain circumstances admitted in evidence, they do not have all the guarantees which surround evidence given under oath in a court of justice. It is assumed that being made in extremity, when the party is at the point of death and believes that all hope of the world is gone, they have some guarantee of their truth in view of the solemnity of the occasion or such as an oath in court would have. But it is clear that their value as evidence rests upon an assumption, and hence it is that while the law recognizes the necessity of admitting such proof on a par with an oath in a court of justice, it does not and cannot regard it as of the same value and weight as the evidence of a witness given in a court of justice under all the tests and safeguards which are there afforded for discovering the truth, for the accused has the opportunity in court of more fully investigating the truth of the evidence by means of cross-examination, which the defendant is denied in the case of a dying declaration, and the jury have the opportunity of observing the demeanor of the person while the testimony is being given from the stand. The power of cross-examination is quite as essential to the process of eliciting the truth as is the obligation of an oath,

and where the life or liberty of the defendant is at stake the absence of the opportunity for cross-examination is a serious deprivation, which differentiates in nature and degree the evidence of a dying declaration from that which is direct and given upon the witness stand. The jury should not receive the impression that however admissible in evidence the dying statement is, it is as valuable or as authoritative for the purpose of proving the defendant's guilt as though this same evidence had been given by a witness in a court of justice with every opportunity to the defendant to investigate its truth by means of cross-examination.

"The mere fact that these statements have been admitted in evidence by the court is not in any way binding on you in your deliberations. You are at liberty and it is your duty to determine for yourselves whether the necessary facts have been established beyond a reasonable doubt by the evidence in this case which are a foundation for the consideration of these statements in evidence by you. These necessary facts are: First, that the statement was made voluntarily, at a time when Mrs. O'Brien knew and was fully conscious of the fact that she was in a dying condition. Second, that such statements were made at a time when she was fully conscious of all that transpired and fully understood the meaning and import of the questions and answers, and that her mind at that time was in such a condition that she was in such possession of her reasoning faculties as to entitle her declarations to credit at your hands, and that she fully understood and comprehended all of the facts, circumstances, and transactions dealt with in those statements. Third, that at the time the statements were made she was under no duress or compulsion, but that the statements were made freely and voluntarily by her. Fourth, that the statements were hers and not the statements of any other party. If you should find that any of these necessary facts just set forth are lacking, you will disregard entirely those declarations. The mere fact that the declarations have been admitted in evidence by the court does not in any manner determine for the jury anything as to the weight or credibility of these statements. You are the sole judges as to the weight and credibility to be given to these dying declarations under the rules that have just been stated, and if you find from the evidence that at the time said state-

ments or declarations were alleged to have been made Mrs. O'Brien was in such a mental condition as to not comprehend and understand all of the answers and the questions, or the import of the answers and questions, or if you find at that time she did not have such possession of her reasoning faculties as to entitle her declarations to credit, or if you find that such declarations were not freely and voluntarily given, but were given under coercion or compulsion, you are to disregard these declarations in arriving at your verdict. In arriving at a determination of this question you will take into consideration all the surrounding facts and circumstances as disclosed to you by the evidence in this case. In determining the weight or credibility to be given to these dying declarations, less weight and less credibility should be given to a declaration obtained from a person *in extremis* by means of leading questions than to a statement which is voluntarily made by the same person in narrative form. In considering these declarations you should take into consideration the manner in which the statements were obtained, whether they were narrative statements of facts or whether the statements were elicited by means of questions, and you should also take into consideration the form and nature of these questions as disclosed to you by the testimony, and if from the testimony you believe that the declarations are in reality statements of someone else, put into the mouth of Mrs. O'Brien by other parties, and not the statements of Mrs. O'Brien freely and voluntarily made, then you should disregard these statements in arriving at your verdict. It must appear with a great degree of certainty that the statements attributed to Mrs. O'Brien are in fact the statements made by her and not those of some other person. In determining what weight you will give to these dying declarations you must consider whether these declarations were induced by fear, or because of the fact that Dr. Dean had said to Mrs. O'Brien on the morning of the day that the statements were made that he would not treat her unless she made a full and complete statement to him; if these matters were in the mind of Mrs. O'Brien, and if they influenced her at the time of making these declarations to such a degree as to operate as a compelling force or reason for making these declarations, so that these declarations were not made freely and voluntarily, but were made under coercion;

if that be your findings, you should wholly disregard these declarations in arriving at your verdict.

"On the other hand, if you are satisfied beyond a reasonable doubt that these statements were made voluntarily, not under any duress or coercion or compulsion, when Mrs. O'Brien was fully conscious that she was in a dying condition, and when she was in such mental condition that she fully understood the meaning and import of the questions and answers, and that her mind was in such a condition at that time that she fully understood and comprehended all the facts, circumstances, and transactions relating to her condition and to the events which had taken place during the past week, and that these statements were her statements and not those of some other person, then you will give consideration to these dying declarations and give them such weight as you believe them entitled to receive after considering all the facts and circumstances in the case."

These instructions are so proper to such a situation as to be well worth preserving in the reports. It follows that the first, second, and third assignments of error covering the first, second, and third exceptions must be overruled.

2. Drs. Dean and Donovan were in attendance on Mrs. O'Brien and learned of the facts in the case by reason of their being in attendance. This information so acquired by them and each of them was necessary to enable them to prescribe for her. Each was sworn as a witness for the state and testified concerning her mental capacity at the time she made the declarations mentioned, as to the symptoms observed and treatment given her, and also to what was discovered in the autopsy conducted by them upon the body of Mrs. O'Brien on July 26, 1911. Sec. 4075, Stats., as amended by ch. 322, Laws of 1911, provides:

"No person duly authorized to practice physic or surgery shall be permitted to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon."

Before the amendment of 1911 the words "shall be compelled" appeared in this statute instead of the words "shall be permitted," as the statute now reads. The amendment of 1911 brought sec. 4075 more nearly in form with sec. 4074, relating to confessions to clergymen, and with sec. 4076, relating to communications by client to attorney.

The learned attorney general takes the broad ground that this statute has no application to criminal prosecutions. He cites authority to the effect that "the purpose of the statute . . . is to protect the patient and not to shield one who feloniously takes his life. The authorities uniformly support this position." This question was mooted but left undecided in *Smits v. State,* 145 Wis. 601, 130 N. W. 525. We leave the question still open and undecided.

Sec. 4078*d,* Stats. (Laws of 1905, ch. 149), provides:

"No person shall be excused or privileged from testifying fully under oath in any prosecution brought under the provisions of secs. 4352 or 4583 of the Statutes of 1898 or for any of the causes mentioned in either of said sections when so ordered to testify by a court of record or any judge thereof; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which such person may so testify or produce evidence, except for perjury committed in giving such testimony."

This prosecution is under sec. 4352 mentioned. It will be observed that the opening sentence of this section is broad enough to sweep away all privilege in such cases. Whether it should be interpreted and applied as broadly as its words might indicate, need not be decided here. All that is necessary to consider in the instant case is whether the provisions of this section take away, in prosecutions for abortion, the privilege conferred by sec. 4075, as amended by ch. 322, Laws of 1911. We think it does. Counsel for accused seek to limit the scope of sec. 4078*d* by the concluding sentence of that section, which provides that no person shall be prosecuted

or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such person may so testify or produce evidence. The effect of such construction would be to limit the sweeping words contained in the first sentence of the section to the privilege against self-incrimination. This we cannot do. It restrains the statute unduly. The more reasonable interpretation is that the privilege against self-incrimination and the professional privilege of a physician are both taken away by sec. 4078*d*, but in order to render it valid and constitutional as to the first, the legislature added the last sentence in the nature of a proviso. This immunity from prosecution on account of anything which the accused is compelled as a witness to disclose is provided for in actions to recover public money by ch. 85, Laws of 1901; in actions to recover license fees, taxes, penalties, or forfeitures, by ch. 447, Laws of 1905; in actions relating to miscarriage or abortion, by ch. 149, Laws of 1905, which is sec. 4078*d*. It also occurs in the so-called anti-trust law, sec. 1791*j* *et seq.*, Stats. (Supp. 1906). In the latter case the particular privilege against self-incrimination is mentioned, that privilege taken away, and immunity from prosecution given in its stead. In sec. 4078*d* this particular privilege is not mentioned, nor is the immunity confined to an accused person, but all privilege is apparently abolished as to all persons in respect to such criminal prosecution. Because of the nature of the crime and the necessity of resorting to medical evidence in order to establish its commission, we are satisfied that the privilege accorded by sec. 4075, Stats., as amended by ch. 322, Laws of 1911, is, in cases like this, taken away by sec. 4078*d*. Assignments of error 4, 5, 6, and 7, covering exceptions 4, 5, 6, and 7, are therefore overruled.

3. Drs. Ravenel, Bardeen, and Bunting were not licensed to practice as physicians in this state. Dr. Ravenel is a director of the State Hygienic Laboratory and professor of bacteriology in the University. Besides teaching, his work in-

cludes examination of bacteriological specimens. He has an M. D. diploma from a South Carolina university and has done post-graduate work at the University of Pennsylvania, at the Pasteur Institute in Paris, and also in Germany and Italy. He has practiced medicine and surgery in South Carolina, also in Pennsylvania. He testified to the effect that the tube of pus taken from the abdominal cavity of deceased contained the bacteria known as streptococci and he found bacterial indication of intense infection in the parts submitted to him for examination.

Dr. Bardeen is dean of the medical college at the State University, professor of anatomy and embryology. He has had experience in laboratory work and at clinics and hospitals. He made an examination which he detailed at great length, and was of opinion that pregnancy had taken place five or six weeks prior to death. .

Dr. Bunting is professor of pathology at the University and specializes in histology and bacteriology. He has had practical experience as medical house officer at Johns Hopkins Hospital and has taken part in many *post-mortem* examinations.

None of these gentlemen had any license or certificate of registration as a physician in this state. Their testimony is challenged as incompetent under sec. 1436, Stats., as amended (Laws of 1903, ch. 426, sec. 8), reading as follows:

"No person practicing medicine, surgery or osteopathy shall have the right . . . to testify in a professional capacity as a physician, or surgeon, or insanity expert in any case, unless he or she holds a license from the Wisconsin Board of Medical Examiners, or the certificate of registration hereinbefore referred to, with a diploma from a reputable medical college or society or a certificate of membership in a medical society, and has been duly recorded as a practitioner in the state of Wisconsin; provided, that nothing in this act contained shall be construed as restricting any court in a criminal action from receiving the testimony of any person as a witness."

The gentlemen mentioned were not within the statute quoted, because they were not persons practicing medicine, surgery, or osteopathy, and they did not testify in a professional capacity as physicians, surgeons, or insanity experts. The proviso of the statute would also remove the disqualification theretofore mentioned so far as criminal cases are concerned. The mere fact that the science of medicine covers, includes, or requires some knowledge of bacteriology, or chemistry, or botany, or biology, or embryology would not exclude an expert in either of these sciences under sec. 1436, as amended by sec. 8, ch. 426, Laws of 1903. Assignments of error 8, 9, and 10, covering exceptions 8, 9, and 10, must be overruled.

4. Upon the trial counsel for the defendant called to the witness stand the husband of the deceased and propounded to him the following question: "I will ask you, Mr. O'Brien, whether or not during the latter part of that week you had sexual intercourse with your wife?" On objection by the state this testimony was excluded. We think this ruling was correct, because an affirmative answer would not raise any material issue or controvert evidence offered by the state upon any material point. It is only by the most strained inference that counsel for accused are able to imagine any contradiction. In her dying declaration Mrs. O'Brien said that her sickness followed the removal of the tube. In order to make this testimony relevant we must presume that sickness to the point of disability immediately followed the removal of the tube. The witness said no such thing. On the contrary, from both declarations, taken together, it is apparent that severe or acute sickness did not set in until Sunday night. The testimony of the defendant shows that he was called to see her again on Sunday evening and found her sitting up and in such condition that he came away without offering to give her medicine, treatment, or examination. Thus we have the deceased, after the week had passed, in the condition

last described. Under such circumstances the question proposed was entirely irrelevant to the guilt or innocence of the accused. Assignments of error 11 and 12, covering exceptions 11 and 12, are therefore overruled.

We find no error in the rulings of the court below so far as such rulings are presented by the exceptions taken and certified to this court. The merits of the case are not before us and we express no opinion thereon. The cause will be remanded to the circuit court for further proceedings according to law.

By the Court.—It is so ordered.

BARNES, J. (*dissenting*). I think it was error to admit the testimony of Drs. Dean and Donovan. That the error was prejudicial, if there was one, does not admit of doubt. It is held that their testimony was competent under sec. 4078*d*, Stats. (Laws of 1905, ch. 149). This section is broad and sweeping in its terms and is susceptible of the construction placed thereon by the court. However, I believe this construction of the statute to be erroneous, and, even if it is not, that these two physicians were debarred from testifying by ch. 322, Laws of 1911, which necessarily repealed sec. 4078*d* in so far as it applied to the testimony of physicians.

By sec. 4072, Stats. (1898), a husband or wife is not permitted to disclose confidential communications made by one to the other during marriage, without the consent of the one making the communication.

By sec. 4074, Stats. (1898), a clergyman is not allowed to disclose a confession made to him in his professional character, without the consent of the party confessing.

By sec. 4075, Stats. (1898), as it stood prior to its amendment in 1911, a physician could not be *"compelled"* to disclose information acquired in attending a patient in a professional capacity and which was necessary to enable him to treat the patient.

Under sec. 4075, as amended by ch. 322, Laws of 1911, no physician is *"permitted"* to disclose information acquired while attending a patient.

By sec. 4076, Stats. (1898), an attorney is not allowed to disclose a communication made to him by his client.

Sec. 4078*d* was not enacted until 1905, and if it amends or affects any of the foregoing sections it necessarily amends and affects all of them. It would be utterly illogical and inadmissible to single out sec. 4075 and say that it was affected by the law of 1905 while the other sections were not. There is no room for drawing any distinction between them. If these two doctors can be compelled to testify, then *Dr. Law's* wife, if he has one, might be called to the stand by the prosecution and be compelled to disclose any communication or admission made by him to her relative to the alleged criminal operation on Mrs. O'Brien. Likewise, *Dr. Law's* attorneys might be called and asked as to any statements made by him to them which would tend to show guilt on his part, and be compelled to make a full disclosure. Furthermore, if the doctor was a member of a church having a confessional, and he had made a confession between the date of the commission of the alleged offense and the date of the trial, the clergyman to whom the confession was made could be compelled to testify to what the doctor told him, or could be sent to jail indefinitely in the event of a refusal.

These four statutes were passed in the interest of sound public policy. It is highly improbable that the legislature intended to repeal them as to the two kinds of prosecutions mentioned in sec. 4078*d*. While these offenses are serious, only one of them is made a felony by statute. It seems incongruous to close the mouths of certain persons to whom confidential communications are made in cases involving such heinous crimes as first-degree murder, rape, and others that grade above second-degree manslaughter, while as to one offense coming under the latter degree of homicide and one

misdemeanor there is no immunity whatever. No special reason is apparent why these statutes should be repealed as to crimes mentioned in sec. 4078*d*. The necessity for removing the privileges referred to in order to secure a conviction is no greater in the cases covered in sec. 4078*d* than in many other cases. It surely is no greater than it would be in a prosecution against a physician for administering poison which was intended to and did produce death.

Proper effect must be given to the statute, because it was designed to accomplish some purpose. I think its purpose is quite manifest. Abortions are for the most part resorted to where pregnancy results from illicit intercourse. The man in the case often furnishes the money for the operation and secures the services of the person who is to perform the abortion. By doing so he becomes a criminal, but nevertheless his evidence may be essential to secure a conviction of the party performing the operation where death results therefrom. So he is compelled to testify, but when he does so is necessarily afforded immunity from prosecution for the crime which he has committed. So the woman may be compelled to testify where the operation does not result in death, but she, too, is thereafter exempt from prosecution for her participation in the crime which she was compelled to disclose. So too any one who counsels, aids, abets, or advises the commission of the offenses defined by secs. 4352 and 4583, Stats., may be compelled to testify in a prosecution against the party who administers the drug or performs the operation designed to produce a miscarriage, but he cannot thereafter be prosecuted criminally.

I think the purpose of sec. 4078*d*, Stats., was to secure the evidence of parties who might themselves be guilty of criminal conduct, in order to convict the person who actually performed the abortion. The immunity provision contained therein would indicate that such was its purpose. Drs. Dean and Donovan needed no immunity because they had com-

mitted no offense. The object of this clause was to preclude guilty parties from concealing a crime or shielding an abortionist by hiding behind their constitutional privilege to decline to testify to anything that would tend to incriminate them. Of course the legislature might go farther, and the court holds that it has done so. I believe, however, that if the legislature had intended to repeal the four statutes referred to in so far as they pertained to prosecutions under secs. 4352 and 4583, Stats. (1898), some express reference would have been made to them.

I am clearly of the opinion that sec. 4075, Stats., as amended by ch. 322, Laws of 1911, applies to criminal as well as to civil cases. Some doubt is expressed in *Smits v. State,* 145 Wis. 601, 130 N. W. 525, as to whether sec. 4075 as it originally stood applied to criminal actions. The statute in terms applied to all cases, and it would be difficult to find satisfactory reasons for limiting its application to civil cases only. Whatever doubt might arise under sec. 4075 before the amendment, there is hardly room for any since. The court leaves this question open because it was not found necessary to decide it. It is necessary for me to allude to it, however, because if I reached the conclusion that the statute had no application to criminal cases, I could see my way clear to vote to sustain the conviction. The portion of ch. 322, Laws of 1911, not quoted in the opinion of the court, reads as follows:

"But as a witness in his own behalf, he may disclose such information in any civil action brought by such patient or his legal representatives to recover damages for malpractice in such professional attendance, and also in any criminal prosecution for such malpractice, whenever such patient or his legal representatives shall have first given evidence relating to such information."

It will be seen that this statute expressly provides that in one class of criminal cases the physician may testify. There

could hardly be a much stronger expression of legislative purpose to have the statute apply to criminal cases generally. The physician is precluded from testifying in all cases except in a civil action against him for malpractice and in a criminal prosecution for malpractice where the patient or her representatives shall have given evidence relating to the information communicated to the doctor. Surely if the legislature conceived that it was enacting a statute that applied to civil cases only, it would not except a single kind of a criminal prosecution from its operation. It is just as certain that the words of the statute cover all actions whether civil or criminal.

I have not deemed it necessary to discuss the prejudicial character of the evidence of Drs. Dean and Donovan, if the witnesses were incompetent, because it is not suggested in the opinion that the evidence which they gave would not be prejudicial if it was erroneously received. I do not understand that there is any difference of opinion on this proposition among the members of the court.

Because I think prejudicial error was committed in receiving this evidence, I am of the opinion that a new trial should be ordered.

I have been requested by Mr. Justice SIEBECKER to say that he concurs in this opinion.

The following opinion was filed September 20, 1912:

TIMLIN, J. Counsel for accused, on motion for rehearing, present that this court erred (1) in ruling that the dying declarations were admissible; (2) in ruling that the jury was properly allowed to pass upon the mental capacity of the declarant to make such declaration; (3) in ruling that there was not evidence of any coercion or persuasion sufficient as matter of law to render incompetent the dying declarations; and (4) in receiving the testimony of Drs. Dean and

Donovan. This is substantially presenting for the second time the arguments which failed to convince us at the first hearing. While this calls for reconsideration, when a motion so supported is denied the denial is usually accompanied by no written opinion. In deference, however, to the very earnest, courteous, and learned presentation of the matter, it may not be amiss to state that we have reconsidered the questions presented and find no reason to recede from the former opinion in the case.

If the admissibility of dying declarations was governed by the rules of law relating to confessions of guilt there would be great force in the arguments of counsel. There are, however, fundamental differences. An inducement to confess is an inducement to accuse oneself of crime. An inducement to make a dying declaration is not an inducement to accuse any one of crime. Confession is admissible as a declaration against interest in all cases and carries with it all relevant evidence therein contained. A dying declaration is admissible only in cases of homicide (*State v. Dickinson,* 41 Wis. 299), and only so far as it purports to give facts and circumstances under which the mortal injury was inflicted or identifies the person who inflicted the same. It is only admissible when made by the declarant under a sense of impending death from such injury, and the rule admitting the declarations had its origin in the necessities of the case and in the belief that under such circumstances there would exist no inducement to falsify and no reason for falsification. Unlike a forced confession, it in no degree impinges upon the constitutional rule that no person should be compelled to be a witness against himself, although it has been considered seriously with reference to that other constitutional provision which gives the accused the right to confront the witnesses against him (sec. 7, art. I). The whole subject will be found treated in Wharton, Crim. Ev. (9th ed.) §§ 276, 304; 4 Ency. of Ev. 910; Dec. Dig. ABORTION, § 10, HOMICIDE,

§§ 200 to 221. By using the key number of that digest the investigator will be enabled to bring the subject down through the American Digest to the present time. In several of the cases the subject of dying declarations made in response to leading questions is considered and some of the precedents go very far in support of their admissibility. Without here going to the length of these cases, suffice it to say that no reasonable request for a statement of the circumstances under which a mortal injury was inflicted and no reasonable or proper insistence upon such statement, where such insistence is essential to diagnosis by a physician or as a protection against prosecution, will be sufficient to exclude a dying declaration. The insistence here was of this character. Dying declarations are made by one under a sense of impending death, not in the interest of the declarant, but theoretically at least in the interest of vindicating the law or of protecting innocent persons who might be wrongfully accused, and such declarations must possess the general characteristics of *res gestæ,* although more remote in time than what would be ordinarily admissible as *res gestæ.* It would be most illogical to admit their competence on other grounds but refuse to receive them in evidence because the making of a declaration was suggested by one who had proper grounds for making the suggestion.

We are unable to come to any conclusion which would change our former opinion with reference to the admissibility of the testimony of Drs. Dean and Donovan. The learned attorney general calls our attention here to the amendment made by sec. 44, ch. 664, Laws of 1911. We are also satisfied with the construction heretofore given sec. 4078*d,* Stats. (Laws of 1905, ch. 149).

The case is not before us upon review of an order denying a motion for a new trial. Some of the evidence relative to the presence of older lesions about the ovaries or Fallopian tubes and the presence of connective tissue tends to cast some

doubt upon the origin of the peritonitis which resulted in death. The testimony relative to the probable age of this connective tissue is not very satisfactory. This decision in no way prevents the making and consideration of a motion for new trial in the trial court under sec. 4719, Stats. (1898). If such a motion be made, additional light may perhaps be thrown on the subject of the origin of the peritonitis.

FRED MILLER BREWING COMPANY, Respondent, vs. CITY OF MILWAUKEE, imp., Appellant.

April 25—October 8, 1912.

Appeal from civil court of Milwaukee county: Notice to be served on judge: Statute construed.

1. Under ch. 549, Laws of 1909, as amended by ch. 425, Laws of 1911, appeals from the civil court of Milwaukee county are governed by the statutes relating to appeals from justices' courts, except that the returns and amended returns upon appeal are to be made by the clerk; but the notice of appeal and affidavit of good faith must be served upon the civil judge.
2. In subd. 2 of sec. 14, ch. 549, Laws of 1909, as amended, relating to "the practice, pleadings, trials, judgments and proceedings thereafter" in certain cases, the words "proceedings thereafter" refer to proceedings for the enforcement of the judgment or in conformity with the judgment, as distinguished from "proceedings upon . . . appeal," which have reference to proceedings adverse to the judgment.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This action was commenced in the civil court of Milwaukee county to recover $350, the alleged value of a horse which was lost by reason of an injury received on one of the bridges in the city of *Milwaukee* alleged to have been defective and out of repair, with notice to the defendants of such defect.

No jury was demanded, and under the practice in such court the case was tried by the court and the following findings made:

1. That on the 4th day of August, 1910, the east approach to State street bridge was reasonably safe for public travel.

2. That the space and conditions existing between the east approach to the State street bridge and the bridge itself wherein an opening was left was reasonably safe for public travel.

3. That said hole or opening between the east end of State street bridge and said approach, together with the iron plating and frog and conditions surrounding the same as established by the evidence, was reasonably safe for public travel.

4. That the plaintiff's horse was not injured by reason of any defect in the street.

5. That the place where said injury was alleged to have occurred is a public street in the city of *Milwaukee*.

6. That there was no insufficiency or want of repair sufficient to constitute a defect.

7. That no proof has been made by the plaintiff of any negligence of the Milwaukee Electric Railway & Light Company.

As conclusions of law the court found:

1. That the street was reasonably safe for public travel.

2. That there was no defect in the street.

3. That the city of *Milwaukee* is not liable.

4. That the Milwaukee Electric Railway & Light Company is not liable.

5. That the defendants are entitled to judgment dismissing the complaint of the plaintiff.

6. That the defendant the city of *Milwaukee* is entitled to $15 attorney's fees, and that both defendants are entitled to the costs and disbursements of this action.

Judgment was entered upon the findings in favor of the defendants.

The plaintiff attempted to appeal, and served upon the clerk of the court a notice of appeal and affidavit that the appeal was made in good faith and not for the purpose of de-

lay, but no notice of appeal was served upon the judge of the civil court. The clerk of the court made return to the circuit court. The plaintiff moved the circuit court to reverse the judgment in the civil court. On this motion the circuit court on the 18th day of November, 1911, ordered that the judgment of the civil court of Milwaukee county entered on the 20th day of January, 1911, in favor of the defendants and against the plaintiff, dismissing the action with costs, be reversed and a new trial granted, such trial to be had in the circuit court for Milwaukee county.

The defendant city of *Milwaukee* appealed from said order to this court.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, *W. H. Timlin, Jr.,* special assistant city attorney, and *Otto H. Breidenbach,* assistant city attorney, and oral argument by *Mr. Timlin.*

For the respondent the cause was submitted on the brief of *E. J. Ludwig.*

The following opinion was filed May 14, 1912:

Kerwin, J. Ch. 549, Laws of 1909, as amended by ch. 425, Laws of 1911, regulates the procedure in the civil courts of Milwaukee county. The record in this case shows that the plaintiff, in attempting to appeal from the judgment of the civil court to the circuit court, served a notice of appeal and affidavit that the appeal was made in good faith and not for the purpose of delay upon the clerk of the civil court, but served neither upon the judge of said court. The question, therefore, arises whether any appeal was ever taken from the judgment of the civil court. We find no provision of law authorizing such appeal without service upon the judge of the civil court. On the contrary, it seems that service upon the judge of the civil court is necessary under the statute. Subd. 1 of sec. 14, ch. 549, Laws of 1909, as amended, provides that all "proceedings in said civil court and in appeals

therefrom shall, except as herein otherwise provided, be governed by the provisions of title XXVIII of the statutes, as amended, relating to courts of justice of the peace and proceedings therein in civil cases. . . . The following sections of the statutes are hereby declared to be inapplicable to said court or the proceedings therein: Secs. 3569, 3584 to 3592, inclusive; 3598, 3616, 3617, 3623, 3638, 3666, 3667, 3716, and 3776." Subd. 2 of the same section and chapter as amended provides that in actions and proceedings specified in secs. 3572 and 3573, Stats., commenced in said court, where the amount involved shall exceed the sum of $200, except actions of forcible entry and detainer, "the practice, pleadings, trials, judgments and proceedings thereafter shall be governed by the provisions of law relating to circuit courts and proceedings therein; except that the time in which any proceeding shall be had shall be governed by the provisions of this act and of said title XXVIII so far as applicable. . . ." The "proceedings thereafter" refer to proceedings on the judgment in the civil court and do not include appeals from the judgment. Proceedings after judgment, under this provision of the statute, have reference to proceedings for the enforcement of the judgment or in conformity with the judgment, not in hostility to it, while proceedings upon appeal have reference to proceedings adverse to the judgment. This becomes apparent when read in connection with subd. 1 of sec. 28, ch. 549, Laws of 1909, as amended, which provides:

". . . Except in bastardy cases, and except as herein otherwise provided, an appeal may be taken to the circuit court of Milwaukee county by any party to an action or proceeding in said civil court from any final judgment of said civil court, or from any order of said civil court from which an appeal to the supreme court might be taken if such order were made by a circuit court. Such appeals shall be taken within twenty days after the entry of the judgment or order appealed from, and the returns and amended returns upon such appeals shall be made by the clerk of said civil court in

the manner provided in ch. 160 of the statutes, relating to appeals from justices' courts. . . ."

Also the following portion of subd. 5 of sec. 28 of said ch. 549:

"The proceedings upon any appeal from any judgment or order of the civil court, except as herein otherwise provided, shall be governed by the provisions of ch. 160 of the statutes relating to appeals from justices' courts and judgments of justices of the peace so far as such provisions may be applicable thereto."

As to the questions reviewable on appeal see *Eder v. Grifka,* 149 Wis. 607, 136 N. W. 154.

We think the provisions of the statutes referred to leave appeals from the civil to the circuit court governed by the statutes relating to appeals from courts of justices of the peace, except that in appeals from judgments of the civil court the returns and amended returns upon appeal shall be made by the clerk; but that the notice of appeal and affidavit must be served upon the civil judge. This was not done in the case at bar, therefore no appeal was taken, and the circuit court was without jurisdiction to make the order appealed from.

No other questions need be considered.

By the Court.—The order appealed from is reversed.

Timlin, J., took no part.

The respondent moved for a rehearing.

In support of the motion there was a brief by *E. J. Ludwig,* attorney for respondent, and *J. O. Carbys, Nath. Pereles & Sons, Rodger M. Trump,* and *Moritz Wittig,* of counsel; also a brief by *Quarles, Spence & Quarles, Charles S. Thompson,* and *Irving A. Fish, amici curiæ.*

In opposition to the motion there was a brief by *Daniel W. Hoan,* city attorney, *W. H. Timlin, Jr.,* first assistant city attorney, and *Otto Breidenbach,* assistant city attorney.

The motion was denied October 8, 1912.

GARTON TOY COMPANY, Respondent, vs. BUSWELL LUMBER & MANUFACTURING COMPANY, Appellant.

April 25—October 8, 1912.

Statute of frauds: Signature to contract: Typewritten name of corporation: Part performance: Delivery pursuant to contract: Sales: Contract: Construction: Breach by vendor: Failure by vendee to pay for part delivered: Measure of damages: Instructions to jury: Evidence: Competency: Expert testimony: Appeal: Harmless errors.

1. A typewritten signature of the name of the vendee corporation to an order for merchandise is sufficient under the statute of frauds to bind such corporation.
2. Although such an order was not signed or accepted in writing by the vendor, a delivery of part of the goods ordered, pursuant thereto, was sufficient part performance to take the case out of the statute.
3. A letter written in reply to a request for deliveries of lumber on plaintiff's previous order, stating that defendant had advised its mill to ship one car at once, then stating that the contract was indefinite as to date of completion, and suggesting a mutual understanding allowing defendant four or five months' time in which to fill the order, is construed as showing such shipment to have been in unqualified compliance with the contract, thereby tolling the statute.
4. Failure to pay for one car of lumber shipped in part performance of a contract of sale, where nothing was due under sixty days, by which time the seller had breached its contract and it was apparent that the buyer would suffer a considerable loss in consequence, would not bar recovery by the latter in an action for damages for such breach.
5. An order by a manufacturer of croquet balls and toys for "100 M ft. of 4 x 4 maple to be cut a little wane or heart on corners so that it will turn off. And 65 M ft. of 2½ inch plank cut so as to be No. 2 and better, with sound hearts," could not be filled by the vendor by shipment of No. 2 and better lumber, unless it was free from heart or wane except a little on the corners that could be turned off; and a requested instruction that he was entitled to determine and select the grades of lumber provided none was lower than No. 2 common, was properly refused.
6. A requested instruction that under such order the vendor was entitled to deliver No. 2 common or No. 1 common according

to the rules of the National Hardwood Association, "without, however, considering wane or heart on corners as a defect," was also incorrect.

7. The vendor having failed to deliver a large part of the lumber ordered, and the vendee having been unable to find maple 4 x 4's in the market and having been obliged to purchase four-inch planks of greater width and resaw them with considerable waste, the question as to what quantity of such planks of the kinds and grades purchased would be required to make as many croquet balls as could be made from the 4 x 4's contracted for and not delivered, was a proper subject for expert testimony.
8. To show the difference between a straight grade of No. 2 common and better and No. 2 common and better from which was excluded all pieces of lumber which had either wane or heart that would not turn off in the process of manufacturing croquet balls, and to justify the purchase by the vendee of a large proportion of lumber of higher grade than No. 2 common, a witness on behalf of the vendee was properly allowed to testify that the 4 x 4's ordered would make a grade of No. 1 common and better lumber, and as to the proportion of higher grades which would be included in the "No. 2 common and better" called for by the contract.
9. Upon the question of damages for the vendor's breach of the contract, the vendee should not be concluded by a statement in its bill of particulars that there was a waste of "at least 12,642 feet" in resawing planks purchased to fill out the contract, especially where it appeared that such figures were the result of a mere estimate.
10. Inaccuracy in the form of a question put to a witness is not a prejudicial error where it is apparent that the witness understood and answered it in the proper sense.
11. Computation of damages upon an incorrect basis is not a material error if the result is as favorable to the appellant as the result of a proper computation would have been.

Appeal from a judgment of the circuit court for Sheboygan county: Michael Kirwan, Circuit Judge. *Affirmed.*

The plaintiff is engaged in the business of manufacturing croquet balls, toys, and novelties at Sheboygan, Wisconsin. The defendant is engaged in the manufacture of lumber. On or about January 5, 1907, the president of the defendant corporation called upon the plaintiff at its office in Sheboygan and solicited an order for the purchase of some lumber. An

agreement was reached, which was evidenced by the following memorandum signed in typewriting by the plaintiff, but not signed by the defendant:

"Sheboygan, Wis., Jan. 5, 1907.

"*Buswell Lumber & Mfg. Co.,*
"Minneapolis, Minn.

"Please enter our order for 100 M ft. of 4 x 4 Maple to be cut a little wane or heart on corners so that it will turn off. And 65 M ft. of 2½ inch Plank cut so as to be No. 2 and better with sound hearts, boxed or otherwise at $23 per M. f. o. b. Sheboygan. To be sawed this winter or early spring; shipped when in shipping condition.

"Terms net 60 days or 2 % off for cash in 15 days from date of shipment. GARTON TOY CO."

One copy of this instrument was delivered to the defendant's representative and one was retained by the plaintiff. There is evidence tending to show that at the time of the making of this contract the defendant understood that the 4 x 4 lumber mentioned in the memorandum was to be used in the manufacture of croquet balls, and that plaintiff could not use material that had wane or heart that would not be eliminated in the process of manufacture. On September 25, 1907, the plaintiff wrote the defendant as follows:

"Please ship us immediately all of the 4 x 4 maple you have cut, as we want to get it piled more open so it will dry faster."

The defendant sent the following answer to this letter:

"*Messrs. Garton Toy Co.,* Sept. 27, 1907.
"Sheboygan, Wis.

"DEAR SIRS: We are in receipt of your favor of the 25th inst., in which you ask us to begin shipments on your maple, and we have advised our mill to ship you one car at once, and will arrange to ship you more as we accumulate the stock from time to time that is in fair shipping condition.

"Desire to say with reference to your contract, we find there is no specified date for completion of the contract and advise you, therefore, that owing to the fact that we have

been able to run our mill only one shift, on account of shortage of labor, we have not been able to produce as much on the contract as we had expected to do, and it looks now as though it would take us several months to complete your contract. We expect to be able to give you all that is called for on the contract, but it will take us, as stated, a longer time than the writer had anticipated.

"The writer desires very much to have a mutual understanding so that we can lay our plans to mutual advantage. I should say that it will take us four or five months, at least, to get out your orders unless we are able to run our mill a double shift.

"Kindly let us hear from you if you have any suggestions to offer as to the delivery of the stock.

"Respectfully yours,

"Buswell Lbr. & Mfg. Co.

"F. W. Buswell."

Under date of October 4th the defendant invoiced a carload of lumber to the plaintiff, which contained 9,598 feet in the aggregate, of which amount 2,080 feet was 4 x 4 lumber. On October 8, 1907, plaintiff acknowledged receipt of the invoice and stated:

"According to our contract this maple was to have been sawed last winter or early last spring, and shipped when in shipping condition. Accordingly the lumber should all of it be in perfect shipping condition at the present time, and we certainly must have all of it in our yard before the first of January, or it will very seriously cripple our croquet business. Please advise us by return mail just how much of this stock you have ready to ship now."

A number of letters passed between the parties between this date and December 9th. In the letters written by the plaintiff it insisted that the 4 x 4 should have been manufactured during the winter and early spring and that defendant should fulfil its contract. On the part of the defendant it was stated that it was disappointed in not being able to run its mill night and day, and reference was made to the small

amount of maple logs which it had, and, while generally expressing a willingness to supply the lumber contracted for, it stated that it could not do so for a very considerable period of time. The defendant was informed that unless it furnished the lumber plaintiff would be obliged to go into the open market and buy other lumber to take its place and would hold the defendant responsible for the difference in price. On December 7th the plaintiff refused to pay for the carload of lumber delivered because the defendant had breached its contract. On December 9th the defendant wrote plaintiff as follows:

"We have been sawing on your order and have some of the stock on hand, but will be compelled to cease sawing on your contract unless you will agree to promptly pay for the car which we have shipped you and which is now past due, and waive all claim for damages on account of alleged delay in making shipments. If you accept our terms we will make an especial effort to get the stock out for you; if not, we will be compelled by your action to cancel contract and proceed to collect for the car which is now shipped and past due."

This letter ended the correspondence between the parties. The plaintiff purchased other lumber on the market from time to time to take the place of that contracted for, to the amount of 110,380 feet. It was unable to secure maple of the desired quality sawed into 4 x 4 dimensions, so it was obliged to take dimensions wider than four inches, upon which there was considerable waste. Plaintiff brought this action to recover the damages which it sustained by reason of the breach of the contract. The defendant denied liability and counterclaimed for the purchase price of the carload of lumber shipped. The jury returned the following special verdict:

"(1) During all of the period which constituted a reasonable time for the delivery of the lumber described in the contract in suit which was made by plaintiff with defendant, was

plaintiff ready and willing to receive all of that lumber under the contract? *A.* Yes.

"(2) If the answer to the first question be 'Yes,' then answer this: Did defendant fail to furnish to plaintiff within such reasonable time the 4 x 4 inch maple lumber, or so-called 'squares' mentioned in the contract, excepting only 2,000 feet thereof? *A.* Yes.

"(3) If the answer to the second question be 'Yes,' then answer this: Because of such failure on defendant's part, and in order that plaintiff might be able to carry on its business of manufacturing croquet balls, was plaintiff compelled to purchase in the market other lumber to take the place of the four-inch lumber which defendant agreed to furnish to plaintiff under said contract? *A.* Yes.

"(4) If the answer to the third question be 'Yes,' then answer this: At the times when plaintiff purchased four-inch planks to take the place of the 'squares' which defendant failed to furnish, what was the market value per thousand feet, delivered on board cars at Sheboygan, Wisconsin, freight charges prepaid by the seller, of four-inch planks corresponding as nearly to, and not falling below the requirement of the contract in suit as to the quality or grade of 4 x 4 inch lumber to be delivered thereunder as by reasonable effort could then be purchased in the market, and which was suitable for the manufacture therefrom of croquet balls? *A.* 30 76/100 dollars per thousand feet.

"(5) What quantity of the planks described in the fourth question would be required for the purpose of manufacturing therefrom substantially the same number of croquet balls as could be made from 98,000 feet of the maple squares which defendant agreed to furnish under the contract? *A.* 130,660 feet.

"(6) What would be the quantity and market value of the waste material resulting from manufacturing into squares the quantity of the planks specified in your answer to the fifth question? *A.* 32,660 feet of waste at $15 per thousand feet, of a total value of $489.90.

"(7) What would be the reasonable value of sawing into the so-called four-inch by four-inch squares the quantity of the planks specified in your answer to the fifth question? *A.* $2 per thousand feet.

"(8) Could plaintiff, by the exercise of reasonable effort and diligence, have purchased in the market in the fall of 1907 and the winter and spring of 1908 four-inch by four-inch maple squares suitable then for the manufacture therefrom of croquet balls? *A.* Yes.

"(9) If the answer to the eighth question be 'Yes,' then answer this: At that time, what quantity not exceeding 98,000 feet, and what grade or grades of such squares, could plaintiff have so found for sale in the market? *A.* 14,880 feet, of the grade of first and second clear.

"(10) What quantity of such squares, of the grade or grades specified in your answer to the ninth question, would be required for the purpose of manufacturing therefrom substantially the same number of croquet balls as could be made from 98,000 feet of the maple squares which defendant agreed to furnish under the contract? *A.* 98,000 feet.

"(11) At the time stated in the eighth question, what was the market value per thousand feet, delivered on board of cars at Sheboygan, Wis., freight charges prepaid by the seller, of four-inch by four-inch maple squares of the grade or grades specified in your answer to the ninth question? *A.* Forty-three dollars per thousand feet."

Upon this verdict judgment was entered in favor of the plaintiff, from which judgment defendant appeals.

For the appellant there was a brief by *Richmond, Jackman & Swansen,* and oral argument by *S. T. Swansen.* Upon the statute of frauds they cited, among other cases, *James v. Patten,* 6 N. Y. 9; *Davis v. Shields,* 26 Wend. 341; *Miller v. Pelletier,* 4 Edw. Ch. 102; *Bush v. McFarland,* 94 Tenn. 538, 29 S. W. 899, 27 L. R. A. 662; *Hodson v. Carter,* 3 Pin. 212; *Wiener v. Whipple,* 53 Wis. 298, 10 N. W. 433; *Clason's Ex'rs v. Bailey,* 14 Johns. 484; *Baker v. Calmenson,* 102 Minn. 406, 113 N. W. 1014; *Old Colony R. Corp. v. Evans,* 72 Mass. 25; *Brown v. Snider,* 126 Mich. 198, 85 N. W. 570; *Somers v. McLaughlin,* 57 Wis. 358, 15 N. W. 442; *Spear v. Bach,* 82 Wis. 192, 52 N. W. 97; *Koch v. Williams,* 82 Wis. 186, 52 N. W. 257; *Wardell v. Williams,* 62 Mich. 50, 28 N. W. 796.

For the respondent there was a brief by *Bowler & Bowler,* and oral argument by *E. R. Bowler.*

The following opinion was filed May 14, 1912:

Barnes, J. The defendant contends that the order for the lumber was never subscribed by the plaintiff as required by sec. 2308, Stats. (1898), because it was signed in typewriting and hence was void under the statute of frauds. The question is not material because of reasons hereinafter stated, but if it were, the signature is sufficient to meet the calls of the statute. *Mezchen v. More,* 54 Wis. 214, 11 N. W. 534; *Dreutzer v. Smith,* 56 Wis. 292, 14 N. W. 465; *Finlay v. Prescott,* 104 Wis. 614, 618, 80 N. W. 530; subd. 19, sec. 4971, Stats. (1898); sec. 4192, Stats. (1898); *Cummings v. Landes,* 140 Iowa, 80, 83, 117 N. W. 22; *Herrick v. Morrill,* 37 Minn. 250, 33 N. W. 849.

But it is argued that the contract is void under the statute of frauds because it was not signed by the defendant. On October 4, 1907, the defendant shipped a carload of lumber to plaintiff under this contract and plaintiff accepted and received the same. This was a sufficient part performance to take the case out of the statute. *Amson v. Dreher,* 35 Wis. 615; *Gano v. C. & N. W. R. Co.* 66 Wis. 1, 27 N. W. 628, 838; *Mason v. H. Whitbeck Co.* 35 Wis. 164; *Schmidt v. Thomas,* 75 Wis. 529, 44 N. W. 771; *Prairie Grove C. Mfg. Co. v. Luder,* 115 Wis. 20, 89 N. W. 138, 90 N. W. 1085; *Merriman v. McCormick H. M. Co.* 96 Wis. 600, 71 N. W. 1050; *J. H. Silkman L. Co. v. Hunholz,* 132 Wis. 610, 112 N. W. 1081.

The defendant concedes the correctness of the legal proposition, but contends that under its letter of September 27th the carload of lumber which defendant delivered was not shipped by virtue of the written order, but, at best, under a proposed modification of such order, which if accepted would extend the time of delivery for five months from the date of the letter. We do not so construe it. At the time it was

written the defendant undoubtedly supposed that it was under a valid and binding obligation to furnish the lumber under the terms of the written order. The letter stated that one carload of lumber would be shipped at once pursuant to request contained in plaintiff's letter of September 25th. It then went on to state that the contract was indefinite as to the time of delivery and gave some excuses for not having more of the stock sawed and suggested that an arrangement be made for extending the contract period of delivery. We agree with the trial court that the carload of lumber was shipped in unqualified compliance with the contract, and that the rest of the letter is an apology for not being able to ship promptly, and a plea for an extension of time.

Defendant next contends that there can be no recovery because plaintiff refused to pay for the carload of lumber which was shipped to it. This position is not tenable. There was nothing due on the purchase until the expiration of sixty days from the date of the invoice. By that time the defendant had already breached its contract and it was apparent that the plaintiff would suffer considerable loss in consequence of such breach. Furthermore, the case would seem to fall within the principle of *Campbell & C. Co. v. Weisse,* 121 Wis. 491, 99 N. W. 340, but it is unnecessary to pass on that question.

The appellant urges that the court erred in refusing to give the following instruction:

"The court instructs you that this order only calls for 'No. 2 common and better.' Under the law the defendant was entitled to determine and select the grades of lumber to fill this order, and the amount of lumber in each grade to be delivered, except that no lumber could be delivered that would grade lower than No. 2 common, and the material delivered would have to contain some lumber of a higher grade than No. 2 common."

We think the instruction was incorrect as a matter of law, and would be irrelevant if it were correct in the abstract. As we read the order, the defendant did not have the right to

fill it by shipping No. 2 common and better lumber, unless it was free from heart or wane except a little on the corners that would turn off in the process of manufacture. It is true the court did not hold as a matter of law that this was the correct construction of the order, as it might well have done. It conceived that the order was ambiguous and allowed the jury to ascertain its meaning. This ruling was favorable to the defendant, and it would have been error had the court placed the construction contended for by the defendant on the order. Whatever right the defendant might have had to select the lumber which it agreed to ship, it did not see fit to avail itself of that right, but compelled the plaintiff to procure its stock elsewhere at an inopportune time, and we are only concerned with the question whether a fair and judicious selection was made. This question will be alluded to later. Furthermore, we entertain serious doubt about the right of the defendant to fill this order with practically all No. 2 stock, putting in enough of the higher grades to make a mixture. It is unnecessary to discuss the question.

It is urged that the court also erred in refusing the following instruction:

"The court further instructs you that in this order the defendant was by law entitled to deliver, as No. 2 common, all lumber that would cut fifty per cent. clear, and as No. 1 common all lumber that would cut two thirds clear, under the rules of inspection adopted by the National Hardwood Association, without, however, considering wane or hearts on corners as a defect."

This instruction was immaterial to the issues on trial. It was also incorrect. Under it a 4x4 which graded above No. 3 common would have to be taken by the plaintiff if it contained wane that could not be turned off in the process of manufacturing croquet balls, and likewise a piece of lumber that had heart near the middle of it, although it might be wholly worthless for the purpose for which it was purchased.

Error is assigned because the witness Garton was permitted to testify that the 4 x 4's ordered would make a grade of No. 1 common and better lumber and that the No. 2 common and better called for by the contract would mean "about 5 % No. 2 common, 45 % No. 1, and 45 % firsts and seconds."

This testimony was offered to show the difference between a straight grade of No. 2 common and better and No. 2 common and better from which was excluded all pieces of lumber which had either wane or heart that would not turn off in the process of manufacturing croquet balls. If true, it showed that very little No. 2 common would come up to the specifications of the contract, and would justify plaintiff in buying a small amount of No. 2 common in the market. There was variance in the testimony as to the percentage of No. 2 common that would ordinarily be found in a log run of No. 2 common and better, running from thirty-three and one-third per cent. to seventy-five per cent. The plaintiff purchased only about eighteen per cent. of No. 2 common, and it was proper enough for it to show why such a large proportion of high-grade lumber was purchased. Under Mr. Garton's evidence it is more difficult to find justification for buying so much No. 2 than for buying so little. It is very evident that if a large percentage of No. 2 common, as ordinarily cut, would have heart and wane defects that would not work out in the process of manufacturing the balls as required by the contract, no economy would result from buying this kind of lumber.

The plaintiff, not being able to get dry 4 x 4's of the required quality in the market, was compelled to buy wider dimensions and resaw them. This process necessarily resulted in a large amount of waste material and in considerable expense to cover the cost of resawing. The witnesses Garton and Shufflebottom were each asked: "What quantity of four-inch planks corresponding nearly to and not falling below the quality of grade No. 2 common and better would be

required for the purpose of manufacturing therefrom substantially the same number of croquet balls as would be made from 98,000 feet of maple squares called for under the contract?" The question was objected to by defendant in each instance and each witness was permitted to answer. Garton said you would have to add from twenty-five to thirty-three and one-third per cent. to the 98,000 feet, and Shufflebottom said it would require 130,000 feet. The fault found with the question is that neither of the parties had sufficient experience to qualify him to testify and that the witnesses were permitted to assume that the contract meant anything they wished. The subject was a proper one for expert evidence and we think the witnesses were competent. The other objection is not well taken because the question is in the abstract and makes no reference to the contract. We think the question was faulty in one respect. The evidence showed that plaintiff had purchased 110,382 feet of lumber, some of which graded first and second clear, some No. 1 common and some No. 2 common, and the quantity of each was established by the evidence. The inquiry should have been as to the number of feet of lumber of the kinds and grades purchased it would take to make as many croquet balls as could be made from 98,000 feet of the kind of lumber called for by the contract. We think it is quite apparent that the witnesses so understood the question, and that although it was not strictly accurate in form no prejudice resulted.

Lastly it is contended that the damages are excessive. The court computed damages on the verdict as follows: 130,660 feet at $30.76 per thousand, $4,019.10; cost of resawing, $261.32; total, $4,280.42. From this was deducted for value of waste material, $489.90, and the cost of 98,000 feet at the contract price of $23, $2,254. Total deductions, $2,743.90, leaving $1,536.52 damages. From this amount the court made a further deduction of $136.52, because the

complaint only claimed damages in the sum of $1,400, after eliminating one item of damage therein claimed which was abandoned on the trial. In view of the evidence in the case the defendant might well insist on a different basis of computation as to so much of the shortage on its contract as was not made up by the purchase of the 110,382 feet of lumber which the plaintiff actually bought. It was shown that there was 4 x 4 lumber on the market which plaintiff might have purchased had it been aware of that fact. In view of the deduction of $136.52 made by the court, the result reached was as favorable to the defendant as the result of the computation which we have in mind would be, and the error therefore, if there is any, is immaterial.

The appellant contends that damages should have been assessed upon the theory that the 110,382 feet of lumber purchased produced as many croquet balls as the 98,000 feet would have produced, which the defendant agreed to furnish but did not furnish, and that damages should be assessed on this basis. The claim is based on a statement in the bill of particulars furnished by plaintiff, which recited that there was a waste of at least 12,462 feet in resawing the 110,382 feet of lumber purchased and used, and on a computation of damages made on this assumption. The plaintiff did not assume to know the exact amount of waste that would result from cutting up the lumber purchased, and the figures given represented an estimate somewhat guardedly made. The plaintiff does not say that the waste would be 12,462 feet, but that it would be at least that much. The actual amount of waste was something that it was difficult to determine with mathematical certainty, unless the plaintiff kept track of every board as it went through its factory, and this it did not do. The matter of determining the amount of waste was submitted to the jury without objection and it reached a conclusion that is sustained by the evidence. We do not think

the plaintiff should be concluded by the somewhat equivocal statement contained in its bill of particulars, particularly when it appears that the figures were the result of a mere estimate.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied October 8, 1912.

MILLER, Trustee, Respondent, vs. PAYNE, Appellant, and others, Respondents.

SAME, Respondent, vs. CAMERON and another, Appellants, and PAYNE, Respondent.

May 17—October 8, 1912.

Wills: Construction: Income undisposed of: Estates, when vest: Trusts and trustees: Income and corpus *of estate distinguished: Assessments and dividends on corporate stocks: Profits from various sources: Rights of life tenant and remainderman: Compensation of trustee, by whom paid.*

1. Where a will provides for the payment of certain specific annuities during the period of settlement of the estate, but makes no disposition of the balance of the income, such balance should be added to the *corpus* of the estate.
2. Where a will devises the residue of the estate to trustees to hold for a certain term and pay over the income as specified to the widow and sister of the testator, then to make a partial distribution of the *corpus*, one half to the widow and one fourth to the sister, and to retain the remaining one fourth during the lifetime of the widow, paying the income to her, and at her death to assign the principal to the sister if she should survive the widow, otherwise to the sister's son, it is *held*, in the absence of any language in the will evidencing an intention to postpone or delay the vesting of the estate in such *cestuis que trustent*, that it must be regarded as vesting at the time of the death of the testator.
3. In such case, the element of time was not annexed to the devise itself, as a condition precedent thereto, but merely to the time of assignment thereof.

4. Part of the estate consisting of bank stock, and the executor during the period of administration having paid a large assessment thereon to make up a defalcation by the president of the bank, such payment was properly chargeable to the *corpus* and not to income or, in other words, to the life tenant. It was not, therefore, necessary to reimburse the estate the amount of such payment out of earnings before dividends on the stock could be paid to the life tenant.
5. During the existence of the trust a fifty per cent. dividend was declared on stock of a realty company which had been formed by the testator and others to assist a bank in which he was interested by taking over a tract of land which the bank had acquired, the purpose of the incorporators being to improve the property, hold it until it could be disposed of to advantage, and then sell it and divide the proceeds. The dividend was declared and paid out of the proceeds of the sale of part of such real estate and was the only dividend the company had ever paid. *Held*, that such dividend was a part of the *corpus* of the trust estate, and the life tenant was not entitled thereto.
6. Had the corporation which declared such dividend been engaged in trading in real estate, the profit accruing to it from an enhancement in value of the real estate, as well as from rents and profits, would be income, but the corporation in question was not such trading corporation.
7. The fact that such corporation may have had on hand a surplus of rents and profits from which a dividend might be declared, does not affect the question as to the character of the dividend actually declared from the proceeds of sales.
8. The fact that a dividend declared on bank stock held in trust was charged against a fund designated as undivided profits is not conclusive, as between the life tenant and the remainderman, on the question whether it was a dividend or a part of the *corpus*.
9. The presumption is that a dividend declared on corporate stock is declared out of income, and as between the life tenant and remainderman the burden rests upon the latter to prove it was not.
10. Where all the stockholders in a bank in which testator held stock, including the trustees under his will acting with the consent of the beneficiaries, appropriated a dividend on such bank stock, earned and declared after testator's death, to the purchase of a trust company which became an ancillary institution to the bank, the stock of such trust company must be regarded as income and belongs to the life tenant and not to the remainderman.

11. In a controversy between life tenant and remainderman as to what is "income" from corporate stock, recoveries made on assets previously charged to profit and loss account belong to the *corpus*.
12. Where new bank stock was issued and sold at 170 per cent., and of the premium 53.5 per cent. went to make the book value of the new stock equal the old, the remainder of such premium represented a net profit to be distributed ratably between old and new stock.
13. Profits realized by a bank from the sale of land purchased from a bankrupt estate are not to be regarded as an enhancement of the capital of the bank, but as ordinary profits, and as such belong to the life tenant.
14. A dividend substantially earned at the time of the purchase of bank stock by a testamentary trustee, and declared shortly thereafter, belongs to the principal of the trust estate and not to income.
15. Where a *bona fide* controversy existed between the life tenant and remainderman under a testamentary trust, as to what constituted income and what belonged to the *corpus* of the trust estate, the value of services performed by the trustee in preparing data necessary to the judicial determination of that question was properly charged equally to both parties.

Appeals from a judgment of the circuit court for Milwaukee county: W. J. Turner, Circuit Judge. *Modified and affirmed.*

Henry C. Payne, late of Milwaukee, Wisconsin, died testate on the 4th day of October, 1904. The defendant *Lydia W. Payne* is the widow of the deceased, the defendant *Imogene P. Cameron* is his sister, and the defendant *Winfield H. Cameron* is the son of said *Imogene P. Cameron.* The last will and testament of said Henry C. Payne was admitted to probate in the county court of Milwaukee county on the 11th day of October, 1904, and letters testamentary issued to *George P. Miller* and Frank G. Bigelow as executors. The material portions of the will and codicil are as follows:

"Sixth. I direct my executors from the date of my decease to pay, during the settlement of my estate, to my wife, *Lydia W. Payne,* an income at the rate of $7,500 per annum, and

during the same period to my sister, *Mrs. Imogene P. Cameron,* of Jamestown, New York, an income at the rate of $1,000 per annum. . . ."

"Eighth. After the payment of the annuities aforesaid and the payment of the other sums as aforesaid, and after the payment of the expenses of the administration of my estate, I give, devise and bequeath all the rest, residue and remainder of my estate, both real, personal and mixed, to my friends Frank G. Bigelow and *George P. Miller,* of Milwaukee, Wisconsin, and to their successors in trust, but in trust only and for the uses and purposes as follows:

. . . . . .

"(4) Until the division of my estate as hereinafter provided in paragraph seven (7), to pay annuities as follows: To my wife, *Lydia W. Payne,* $7,500 per annum; to my sister *Mrs. Imogene P. Cameron,* $1,000 per annum. . . .

"(5) If, after payment of said annuities and the expenses of said trust, and interest and taxes, there remain in any year any net income, such net income shall be paid by said trustees, seventy-five per cent. thereof to my said wife and twenty-five per cent. to my said sister.

"(6) I hereby authorize my trustees, their survivor and their successors in trust to invest, and reinvest, in personal property or real estate, any money which shall come into their hands as trustees, and to manage my estate, and all the property, real, personal and mixed, of said estate, in such a way as in their opinion will result to the best interest of the trust, and to that end I hereby authorize and empower said trustees and their survivor and successors in trust, to sell any part or portion of said property, whether real, personal or mixed, at public or private sale, for cash or on credit, as they may think best, and to convert and reconvert real estate into personal property and personal property into real estate, but they are not required to sell any unproductive portion of the estate unless in their opinion it should be deemed best, nor are they required to sell any portion of said estate unless it be necessary to provide the money necessary to pay the annuities or the said monument upon my said lot at Forest Home cemetery. I also authorize my said trustees, and their survivor and their successors in trust, to borrow money for the purposes of the trust, and to secure the repayment of the same

with interest; to pledge or mortgage any portion of said estate and to execute, acknowledge and deliver the proper instruments in writing.

"(7) At the expiration of three years from the settlement of my estate, I direct my said trustees, and their survivor or their successor in trust, to convey and assign to my said wife, should she be living, fifty per cent. of said estate then in their hands, or, in case of her death, to such persons as may be entitled to the same under her will. At the expiration of three years from the settlement of my estate, to convey and assign to my said sister twenty-five per cent. . . .

"(8) My trustees, after such division, are directed to hold the residue of said estate then in their hands and to pay the net income thereof to my wife so long as she may live, and upon her death to pay the whole or principal thereof to my sister, *Mrs. Imogene P. Cameron,* should she survive my said wife, otherwise to her son, *Winfield Henry Cameron.* . . .

"(9) Should she survive me, and should she leave a last will and testament making disposition thereof, I authorize my wife to dispose of her interest in said fifty per cent. of my estate in any way she may desire, and I direct that said division of my estate as provided for in paragraph numbered '7' and '8' shall be made upon the death of my wife, should she die before the expiration of three years from the settlement of my estate." . . .

The only provision in the codicil material to the present inquiry is contained in paragraph 4 thereof, which reads as follows:

"It is my further will and wish that the settlement of my estate shall be reached and concluded within five years from the date of my decease, unless it shall be the wish of my wife and of my said sister, that the estate shall remain unsettled for a longer period of time. I make this further provision for the purpose of designating a limit to the time in which I deem it advisable that my estate shall remain in the hands of trustees, but it is not intended to further limit or modify the provisions of my last will and testament heretofore made."

On the 5th day of February, 1906, *George P. Miller,* being then the sole executor of the estate of Henry C. Payne, de-

ceased, filed his final account of his administration of said estate as executor and a final decree was entered in said estate assigning the residue thereof to *George P. Miller* as trustee, and letters of trust thereupon issued to said *George P. Miller* as trustee under the terms of the last will and testament of said Henry C. Payne, deceased. Thereafter, in December, 1909, plaintiff, as such trustee, made a partial distribution of the trust estate in his possession, which said distribution was consented to by the above named defendants and was ratified and confirmed by an order of the county court of Milwaukee county dated and entered the 30th day of December, 1909. On such partial distribution the estate was divided *in specie,* one half to the defendant *Lydia W. Payne,* one quarter to the defendant *Imogene P. Cameron,* and plaintiff, as such trustee, retained one quarter thereof.

At his death Henry C. Payne owned 400 shares of the capital stock of the St. Paul Avenue Improvement Company of the par value of $100 each, appraised by the county court appraisers as being worth $80 per share, fifty shares of the capital stock of the National Surety Company of the par value of $100 each, appraised by the county court appraisers as being worth $140 per share, and 1,000 shares of stock of the First National Bank of Milwaukee of the par value of $100 each, appraised by the county court appraisers as being worth $100 per share. The appraisal of the value of the stock of said First National Bank of Milwaukee was an appraisal of its market value subsequent to the defalcation of Frank G. Bigelow and prior to the payment into said First National Bank of Milwaukee of the assessment of sixty-six and two-thirds per cent. levied upon all of the stock of said bank to make good such defalcation.

During his administration as executor, *George P. Miller,* as such executor, purchased fifty shares of the capital stock of the St. Paul Avenue Improvement Company of the par value of $100 each, paying therefor the sum of $3,897.60,

all of which was consented to by the defendants herein. *George P. Miller,* as executor, also paid to the First National Bank of Milwaukee $66,666.67 as and for an assessment made upon the 1,000 shares of the capital stock of said bank belonging to the estate of Henry C. Payne, deceased, which said assessment of sixty-six and two-thirds per cent. was levied by the stockholders of said bank upon all of the stock of said First National Bank of Milwaukee in order to make up the amount by which the capital of said bank had been impaired through the defalcation of one Frank G. Bigelow; said payment was made by said *George P. Miller* as executor out of the *corpus* of the estate in his hands and was in his account charged against such *corpus.* In about the month of March, 1909, plaintiff, then acting as trustee, received a stock dividend of fifty per cent. on the stock of the National Surety Company, owned by him as such trustee, which stock dividend amounted to twenty-five shares of the capital stock of the National Surety Company. The amount of said stock dividend was charged by the National Surety Company against surplus and was received by plaintiff and by him credited to income of the trust estate in his hands, but said twenty-five shares of stock was immediately by plaintiff, as trustee, transferred at its par value from income to principal account of said estate to pay an indebtedness of income account to the principal account of said estate, and was thereafter treated by him as a part of the principal of said trust estate, all of which was consented to by the defendants.

The 400 shares of the capital stock of the St. Paul Avenue Improvement Company owned by Henry C. Payne at his death, together with fifty additional shares purchased by said executor, as aforesaid, were transferred by said executor to plaintiff as trustee at the time of the entry of the final decree on the 5th day of February, 1906, and said fifty shares of stock of the National Surety Company, thereafter increased by twenty-five shares as aforesaid, and the 1,000

shares of stock of the First National Bank of Milwaukee owned by said Henry C. Payne at his death, were likewise so transferred to plaintiff as trustee. Upon the partial distribution of said estate by the plaintiff as trustee on the 30th day of December, 1909, plaintiff as such trustee retained as a part of the trust estate to be further administered by him, 119 shares of the capital stock of the St. Paul Avenue Improvement Company, 250 shares of the stock of the First National Bank of Milwaukee, and nineteen shares of the stock of the National Surety Company, said amounts so retained being one quarter of the number of shares of each stock respectively owned by Henry C. Payne at his death, plus one quarter of the number of shares of each stock acquired subsequent to the death of Henry C. Payne, as hereinbefore stated.

The shares of stock last described, constituting the one quarter of the estate retained by plaintiff as trustee upon the partial distribution of the estate, are held upon the trusts set forth in paragraph numbered 8 of testator's will.

In or about the month of January, 1911, plaintiff as trustee received from the St. Paul Avenue Improvement Company the sum of $5,650 in cash, the same being a dividend of fifty per cent. on the capital stock of said St. Paul Avenue Improvement Company standing in the name of said *George P. Miller* as trustee. At or about the same time the said *George P. Miller,* as such trustee, received from the National Surety Company a stock dividend of six and one-third shares of the capital stock of said company of the par value of $100 each, the same being a stock dividend of thirty-three and one-third per cent. on the capital stock of said National Surety Company standing in the name of said *George P. Miller* as trustee.

In February, 1911, the First National Bank of Milwaukee declared a dividend of $532,617.12, the proceeds of which, pursuant to an agreement among the stockholders of the bank, were used to purchase the stock of the First Savings & Trust

Company, upon certain terms and conditions found by the trial court, but not necessary to be here stated.

The St. Paul Avenue Improvement Company was incorporated in 1899 with an authorized capital of $100,000 and with the purposes expressed in its articles of incorporation as follows: "For the purpose of buying and selling real property, improving and leasing the same, and doing of all other things which pertain to business of like nature."

Henry C. Payne, Charles Pfister, Fred Vogel, Jr., and Frank G. Bigelow each subscribed for one fifth of the capital stock. Ephraim Mariner and John W. Mariner each subscribed for one tenth of the capital stock. The original subscribers, except John W. Mariner, were directors of the First National Bank of Milwaukee, and in an effort to help said bank out of a difficulty had taken over the bank's interest in certain lands situated on or adjacent to St. Paul avenue in the city of Milwaukee, which interest had been acquired by the bank as security for certain loans, and the said incorporators assumed the indebtedness to said bank. The five directors of the bank acquired the interests of all persons in and to said lands at a cost of $393,380.30, including indebtedness assumed, and assumed all of the indebtedness thereon, which amounted to $365,215. It was the intention of said directors to hold said land until a favorable opportunity to sell presented itself. Upon the organization of the St. Paul Avenue Improvement Company the interests in said lands acquired by said five directors of said bank were transferred to said company and said company assumed all the indebtedness. The lands were taken over by the company with the intention of managing them and disposing of them as soon as possible, paying up the indebtedness of the company and dividing the proceeds that remained among the stockholders. In or about the month of February, 1901, said St. Paul Avenue Improvement Company increased its capital stock to $200,000, the original stockholders taking their *pro rata*

shares in such increase, and the capital stock of the St. Paul Avenue Improvement Company since that time has been and now is $200,000. Henry C. Payne paid for all of his shares of stock in said company at par in cash. At the time of the acquisition of the properties by the St. Paul Avenue Improvement Company the properties were largely unimproved and unproductive. The increase in capital stock of the company was used prior to the death of Mr. Payne for the purpose of erecting buildings on the properties of the company and making other permanent improvements. Since the death of Mr. Payne no additional lands have been purchased nor have any buildings been erected on the company's properties, with the exception of one building at a cost of about $25,000. Down to the time of the death of Henry C. Payne on October 4, 1904, the carrying charges for the property, including interest on the indebtedness, exceeded the income from the properties except for the years 1903 and 1904, during which years there was an excess of receipts over carrying charges of $1,477.73 in 1903 and $434.79 in 1904. Since the death of Henry C. Payne and down to the time of the declaration of the fifty per cent. dividend above referred to, the net income from said properties from rents, interest, and dividends on stocks owned amounted to $47,540.65. At the time of the death of Henry C. Payne said St. Paul Avenue Improvement Company had invested in the aggregate in properties and improvements the sum of $527,139.46, had made sales of property amounting to $10,075, and had reduced its indebtedness to the sum of $359,315, and had made net earnings from the properties of $1,803.82. At the time of the declaration of said fifty per cent. dividend the St. Paul Avenue Improvement Company had invested in real properties and improvements the sum of $561,835.11, and in seven per cent. preferred stock of the Geuder, Paeschke & Frey Company $23,000. Its total sales aggregated $616,075, and its indebtedness had been reduced to about the sum of $50,000.

Immediately after the declaration of said dividend the property assets of the company were of the fair value of $340,000, which included $200,000 of the seven per cent. preferred stock of Geuder, Paeschke & Frey Company worth par, and real estate of the fair value of $140,000. Six hundred and five thousand dollars of its total sales were contracted for and made by the company subsequent to the death of Mr. Payne, and practically all of such sales or the contracts therefor were made by the company prior to the partial distribution of the Henry C. Payne estate on December 30, 1909. The St. Paul Avenue Improvement Company has not carried on its books a separate account for net earnings or a separate account of profits or surplus. The resolution of the board of directors declaring the fifty per cent. dividend was approved at a meeting of the directors held January 4, 1911, and is as follows:

"Mr. Mariner reported that he had closed the deal with the Minneapolis, St. Paul & Sault Ste. Marie Railway and had conveyed to the Terminal Railway Company the lands which this company had previously contracted to convey and that he had received from it $105,318.75 and moved that the board of directors declare a dividend of 50 % upon its capital stock, payable immediately to its stockholders, which motion seconded by Mr. Pfister and unanimously carried."

The money distributed to the stockholders of the St. Paul Avenue Improvement Company as such fifty per cent. dividend were funds received from Milwaukee Terminal Railway Company as the final payment upon its land contract for the purchase of part of the properties of the St. Paul Avenue Improvement Company, which was entered into about December, 1905. At the time of the death of Henry C. Payne, the St. Paul Avenue Improvement Company's assets consisted only of its properties with the improvements thereon. The dividend of fifty per cent. declared by the St. Paul Improvement Company was paid in cash and was the only dividend ever paid upon the stock of that company since its organization.

The dividend received by plaintiff as such trustee from the National Surety Company, consisting of six and one-third shares of the capital stock of that company, was declared out of surplus accumulated from earnings all subsequent to the death of Henry C. Payne. On December 30, 1909, the capital of said National Surety Company was $750,000 and its surplus $1,004,769.40. Immediately prior to the declaration of said stock dividend in January, 1911, said National Surety Company had a capital of $750,000 and a surplus of $1,163,000. The total amount of stock dividend declared by said National Surety Company in January, 1911, amounted to $250,000. It was declared out of and charged against the surplus of that company. The surplus of said company at the death of Henry C. Payne amounted to $309,912.27. The surplus of said company after the declaration of said stock dividend amounted to $913,000. The said stock dividend so received by plaintiff as such trustee was additional to regular annual cash dividends on said National Surety Company stock.

The dividend of $532,617.12 declared by the First National Bank of Milwaukee to its stockholders on the 15th day of May, 1911, was charged against and paid out of the undivided profits of said bank. At the time of the death of Henry C. Payne said First National Bank of Milwaukee had a capital of $1,500,000, a surplus of $500,000, and undivided profits of $614,309.47, making a book value of approximately 174. Thereafter and in April, 1905, occurred the defalcation of one Frank G. Bigelow, then president of said bank. Prior to said defalcation the book value of said stock was 176.11. Said defalcation seriously impaired the capital and surplus of said bank so that just prior to the levying of the assessment upon the stock of said bank hereinafter referred to the book value of said stock was 68.85. Said assessment of sixty-six and two-thirds per cent. on the capital stock of said bank was paid in by all the stockholders prior

to December 1, 1905. In December, 1905, the capital stock of said bank was increased to $2,000,000 by the sale of $500,000 par value of new stock at 166⅔, , the proceeds of which sale, amounting to $833,333.33, were applied as follows: $500,000 was transferred to capital stock, and the remaining $333,333.33, together with $16,666.67 taken from the then existing undivided profits of the bank, was used to create a new surplus account of $350,000, making the capital and surplus of said bank from that date respectively $2,000,000 and $350,000, and on February 5, 1906, the capital of said bank was $2,000,000, its surplus $350,000, its undivided profits $50,478.08, and its special guaranty fund, which is an undivided profit account, $23,899.82. The trust estate of Henry C. Payne did not subscribe for or purchase any of the shares of stock constituting such increase in the capital stock of said bank in December, 1905. On December 31, 1909, at the time of the partial distribution of the Henry C. Payne estate, the capital of said bank was $2,000,000, the surplus $500,000, undivided profits $311,562.76, and the special guaranty fund $100,000. On May 15, 1911, just before the dividend in dispute was declared, the capital of said bank was $2,500,000, its surplus $500,000, its undivided profits $749,386.50, and its special guaranty fund $171,100.50, and on said 15th day of May, 1911, after the declaration of said dividend, said bank had a capital stock of $2,500,000, a surplus of $500,000, undivided profits $216,000, and a special guaranty fund of $171,100.50. The increase in undivided profits and guaranty fund of said bank from December 31, 1909, to the declaration of said dividend May 15, 1911, was the sum of $508,924.24: $350,000 of such increase was derived from the sale of new stock at 170 as set forth above. The undivided profits and guaranty fund remaining after such dividend was paid exceeded the amount of $350,000 derived from the premium received on the sale of said stock as aforesaid.

In addition to the above facts stipulated between the parties in the trial court, the parties stipulated in this court that the following facts may be considered in the determination of the appeals:

As to the St. Paul Avenue Improvement Company:

The total sales made by the St. Paul Avenue Improvement Company, from the date of its organization down to October 4, 1904, amounted to $10,075; from October 4, 1904, down to February 5, 1906, to $149,000; and between February 5, 1906, and January 4, 1911, to $449,500. Total, $608,575. The sale by the company to the Milwaukee Terminal Railway Company is included in the $149,000 of sales from October 4, 1904, to February 5, 1906. The net earnings of the company from rents, interest, and dividends on stocks owned was for the period from October 4, 1904, to February 5, 1906, $5,131.74, and for the period from February 5, 1906, to January 4, 1911, $42,300.21.

As to the First National Bank of Milwaukee, Wisconsin:

1. Gross amount of assets charged to profit and loss between October 4, 1904, and February 5, 1906, both dates inclusive	$2,537,659 35
2. Gross amount of subsequent recoveries made out of all items charged to profit and loss on and prior to February 5, 1906:	
(A) Between October 4, 1904, and February 5, 1906, inclusive	256,651 28
(B) Between February 5, 1906, and December 31, 1909, inclusive	238,099 90
(C) Between January 1, 1910, and May 15, 1911, inclusive	33,236 76

At the bankrupt sales of Frank G. Bigelow, on whose account much of the charges of assets to profit and loss during the period from October 4, 1904, to February 5, 1906, were made, the bank purchased the interest of Mr. Bigelow in some coal lands in Colorado. The bank, previous to such purchase, had no interest in or lien on these lands or on Mr. Bigelow's interest therein. The purchase was made because the bank knew they could be secured at a low price and expected to

make a profit on the purchase. The interests were subsequently sold by the bank at a profit and the profit carried into the undivided profits of the bank. The dates of purchase and amounts paid and the dates of sale and the price received for the said lands are as follows:

1. Date of purchase.	
April 4, 1906,—1,600 acres	$19,555 56
May 10, 1907,—40 acres	100 00
June 7, 1907,—160 acres	100 00
Purchase price	$19,755 56
2. Date of sales.	
May 2, 1907,—600 acres	$23,916 00
February 11, 1910,—1,200 acres	120,749 61
Selling price	$144,665 61
Expenses and taxes paid	$3,464 55
The above lands were bought and carried on the books of the First National Bank of Milwaukee as real estate.	
3. Statement of capital assets of First National Bank, as of February 5, 1906:	
Capital	$2,000,000 00
Surplus	350,000 00
Undivided profits	53,321 50
4. Dividends declared by bank from October 4, 1904, to May 15, 1911:	
December 30, 1904, 2½ % on capital $1,500,000 (last quarter)	$37,500 00
Year 1905, 2½ % on capital $1,500,000 (first quarter)	37,500 00
Year 1906, 4 % on capital $2,000,000	80,000 00
Year 1907, 5 % on capital $2,000,000	100,000 00
Year 1908, 6 % on capital $2,000,000	120,000 00
Year 1909, 7 % on capital $2,000,000	140,000 00
Year 1910, 8 % on capital $2,000,000	160,000 00
January 1, 1911, to May 15, 1911, 3 % on capital $2,000,000	60,000 00

The plaintiff above named as trustee has performed services in investigating the facts surrounding the declaration and receipt by him of each of the dividends referred to in his complaint herein and in preparing a complaint and supplemental complaint for the purpose of submitting the questions to the court, and for such services and the necessary attention to be given by him to the entry of the decree of the court the sum of $500 is reasonable compensation. The plaintiff secured

the consent of the defendants *Cameron* to the representation in this action of defendant *Lydia W. Payne* by the firm of which plaintiff is a member.

The trial court entered judgment which, so far as material to the appeals taken, decreed:

First. The dividend received by plaintiff as trustee from the St. Paul Avenue Improvement Company in or about the month of January, 1911, in the sum of $5,650 is and should be treated as a part of the *corpus* of the trust estate in the hands of plaintiff and should be held and invested by plaintiff as such *corpus,* subject to the provisions of the last will and testament of Henry C. Payne, deceased, and the income from such investment paid to the defendant *Lydia W. Payne* as life tenant of the trusts of which plaintiff is trustee and as the person entitled to the income of said trust estate.

Second. The dividend received by plaintiff as such trustee from the National Surety Company, consisting of six and one-third shares of the capital stock of such company, is income of said trust estate and belongs to the defendant *Lydia W. Payne* as life tenant under the trusts of which plaintiff is trustee and as the person entitled to receive the income from said trust estate.

Third. That plaintiff, as such trustee, pay over and transfer to said defendant *Lydia W. Payne* the said six and one-third shares of the capital stock of the National Surety Company received by him as such dividend as aforesaid, or the proceeds thereof, together with all income therefrom or interest thereon received by plaintiff subsequent to the receipt of said six and one-third shares of stock.

. . . . . .

Fifth. The dividend declared by the First National Bank of Milwaukee on or about May 15, 1911, upon the 312½ shares of the capital stock of said First National Bank of Milwaukee, owned by plaintiff as such trustee, and used and disposed of in accordance with the terms of the indenture

dated February 25, 1911, by and between Fred Vogel, Jr., William Bigelow, and Fred T. Goll, as trustees, parties of the first part, and the stockholders of the First National Bank of Milwaukee, parties of the second part, is income of said trust estate. The *corpus* of said estate has been enriched by the amount of said dividend, and the said *corpus* of said estate is indebted to the income account of said estate in the amount of said dividend, as of the 15th day of May, 1911.

Sixth. That the plaintiff as such trustee pay to defendant *Lydia W. Payne* an amount equal to $\frac{3125}{110000}$ of the value of all the capital stock of the First Savings & Trust Company of Milwaukee, Wisconsin, owned and held by Fred Vogel, Jr., William Bigelow, and Fred T. Goll as trustees under the aforesaid agreement of February 25, 1911, and that said amount so paid to defendant *Lydia W. Payne* be by plaintiff as such trustee paid out of and charged against the *corpus* of said trust estate in his hands.

. . . . . .

Eighth. The plaintiff as such trustee is entitled to compensation for services in connection with this action to the amount of $500, together with his costs and disbursements in this action, and that the amount of such compensation and his costs and disbursements shall be paid out of the trust estate and charged one half to the income account of said trust estate and one half to the principal account thereof.

The defendants *Imogene P. Cameron* and *Winfield H. Cameron* appealed from that part of the judgment contained in paragraphs numbered 2, 3, 5, and 6, and from so much of the judgment contained in paragraph 8 as decrees that one half of the sum allowed to the plaintiff for his costs and disbursements be charged to the principal account of the trust estate.

The defendant *Lydia W. Payne* appealed from that part of the judgment contained in paragraph numbered 1.

For the defendants *Imogene P. Cameron* and *Winfield H. Cameron* there were briefs by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Jackson B. Kemper,* of counsel, and oral argument by *Jackson B. Kemper* and *James B. Blake.* They cited 2 Cook, Corp. (6th ed.) secs. 552–554, 559; *Holbrook v. Holbrook,* 74 N. H. 201, 66 Atl. 124; *Hite's Devisees v. Hite's Ex'r,* 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173; *Kalbach v. Clark,* 133 Iowa, 215, 110 N. W. 559; *Walker v. Walker,* 68 N. H. 407, 39 Atl. 432; *Outcalt v. Appleby,* 36 N. J. Eq. 73; *Van Blarcom v. Dager,* 31 N. J. Eq. 783; *Gray v. Darlington,* 15 Wall. 63; *Robertson v. De Broulatour,* 188 N. Y. 301, 80 N. E. 938; *DeKoven v. Alsop,* 205 Ill. 309, 68 N. E. 930; *Brown v. Brown,* 72 N. J. Eq. 667, 65 Atl. 739; *Atkins v. Albree,* 94 Mass. 359; *Brinley v. Grou,* 50 Conn. 66; *Biddle's Appeal,* 99 Pa. St. 278; *In re Allis's Estate,* 123 Wis. 223, 101 N. W. 365; *Pabst v. Goodrich,* 133 Wis. 43, 113 N. W. 398; *Soehnlein v. Soehnlein,* 146 Wis. 330, 131 N. W. 739; *Lang v. Lang's Ex'r,* 57 N. J. Eq. 325, 41 Atl. 705; *Ballantine v. Young* (N. J. Eq.) 81 Atl. 119; *Oliver's Estate,* 136 Pa. St. 43, 20 Atl. 527; *Thayer v. Burr,* 201 N. Y. 155, 94 N. E. 604; *Ex parte Humbird,* 114 Md. 627, 80 Atl. 209; *Newport T. Co. v. Van Rensselaer,* 32 R. I. 231, 78 Atl. 1009, 35 L. R. A. N. S. 553.

For *Lydia W. Payne* as appellant and respondent there were briefs by *Miller, Mack & Fairchild,* and oral argument by *George P. Miller.* They cited *Soehnlein v. Soehnlein,* 146 Wis. 330, 131 N. W. 739; note *Holbrook v. Holbrook* (74 N. H. 201, 66 Atl. 124) in 12 L. R. A. N. S. 768–816; *Read v. Head,* 6 Allen, 174; *Balch v. Hallet,* 10 Gray, 402; *Thomson's Estate,* 153 Pa. St. 332, 26 Atl. 652, 653; *In re James,* 146 N. Y. 78, 40 N. E. 876; *Oliver's Estate,* 136 Pa. St. 43, 20 Atl. 527; *Plympton v. Boston Dispensary,* 106 Mass. 546; *Williston v. M. S. & N. I. R. Co.* 13 Allen, 400; *Crawford v. N. E. R. Co.* 3 K. & J. 723, 744; 2 Perry, Trusts (6th ed.)

§ 874; *Tubb v. Fowler,* 118 Tenn. 325, 99 S. W. 988; *Boardman v. Boardman,* 78 Conn. 451, 62 Atl. 339; *Eisner's Estate,* 175 Pa. St. 143, 34 Atl. 577.

The following opinion was filed June 4, 1912:

Vinje, J. The appeal of *Mrs. Cameron* presents these questions: (1) When did the trust estate vest—at the time of the death of the testator or at the time of the partial division of the estate, December 30, 1909? (2) Should *corpus* bear the loss of the Bigelow defalcation? (3) Should the National Surety Company's dividend of $250,000, declared in January, 1911, go to life tenant or remainderman, or partly to both? (4) Was the First National Bank dividend of $532,617.12, declared in May, 1911, in fact a dividend, or did it remain *corpus?* (5) If a dividend, was it derived from profits earned since the trust estate vested? and (6) Should *corpus* pay one half the compensation awarded the trustee? The appeal of *Mrs. Payne* challenges the correctness of the finding that the dividend of the St. Paul Avenue Improvement Company of $100,000 declared in January, 1911, was paid out of *corpus.*

Before taking up these questions in detail it may be well to consider briefly the general scheme of the testator's will. It clearly contemplates three distinct periods of administration of the estate by the executors and trustees: *First,* the period of the settlement of the estate, during which time it is to remain in the hands of the executors. This period was by the codicil limited to five years from the death of the testator, unless his widow and sister should desire it to remain unsettled for a longer period of time. During the period of settlement specific annuities are required to be paid the widow and sister and others, and no provision is made for the disposition of income. It therefore goes to *corpus* during such period. The testator died October 4, 1904, and the estate was settled February 5, 1906, and then assigned to the trustee, *George*

P. Miller. Second, the period elapsing between the settlement of the estate and the partial division thereof as required by subdivision 7 of paragraph 8. This period was limited to three years from the time of the settlement of the estate, or to the time of the widow's death should it occur earlier. During this period specific annuities were to be paid the widow and sister and others, and the net income in any one year to be paid seventy-five per cent. to the widow and twenty-five per cent. to the sister. At the end of this period, after the payment of certain specified legacies, one half of the estate was to be assigned to the widow, one quarter to the sister, and one quarter retained by the trustees, and the net income thereof paid to the widow during her life, and upon her death to assign the principal to his sister, should she survive the widow, otherwise to his sister's son, *Winfield H. Cameron.* The partial distribution of the estate took place December 30, 1909. *Third,* the period between the partial distribution of the estate and the death of the widow, during which time the trustees were to hold one quarter of the estate and pay the net income to her.

From the time of the settlement of the estate to the time of the partial distribution thereof all net income received was paid seventy-five per cent. to the widow and twenty-five per cent. to the sister, as directed by the will. Since the estate was divided *in specie* and the division of net income and of estate go to the widow and sister in the proportion of seventy-five per cent. to twenty-five per cent. (including in widow's share the one quarter of the estate held by the trustee for her use), it becomes immaterial to ascertain how much, if any, of the dividends in question were earned prior to the partial distribution of the estate; for after such partial distribution the widow is entitled to the net income of seventy-five per cent. of the estate—the fifty per cent. assigned to her and the twenty-five per cent. held by the trustee,—and the sister is entitled to the income of her twenty-five per cent. of the estate,

which is just in the same proportion in which they shared net income prior to the partial distribution. In other words, the percentage of stock from which they derive income after the partial distribution is just the same as the percentage of income they had from the stock before such distribution.

Aside from specific legacies and annuities mentioned in the will of the testator, the whole estate held by the trustees was to be assigned to the widow and sister, one half to the widow and one quarter to the sister, at the time of the partial distribution, and the other one quarter to the sister upon the death of the widow, should the sister survive, and, if not, to her son, *Winfield H. Cameron.* There is a direct specific devise of the estate to the trustees for the purpose of so disposing of it. Such devise, in the absence of any language in the will evidencing any intention to postpone or delay the time it is to take effect, must be regarded as vesting the estate in the *cestuis que trustent* at the time of the death of the testator. *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073; *Matter of Brown,* 154 N. Y. 313, 48 N. E. 537. There is no uncertainty as to who are the *cestuis que trustent.* They are specifically named in the will. Three quarters of the estate was to be assigned directly to them within three years of the settlement of the estate without any intervening estate in any one, and the other quarter was subject only to the life estate of the widow. They were all in being at the time of the death of the testator. The widow had the immediate right to the possession of one half the estate upon the partial distribution thereof. The sister had the immediate right to the possession of one quarter of the estate at the same time, and to the other quarter upon the termination of the life estate of the widow therein. There is nothing in the will to make the persons to whom, or the events upon which, the estates are to take effect, uncertain. Their estates therefore vested at the time of the death of the testator. In *Venner v. Mauer,* 133 Wis. 325, 113 N. W. 663, it was held that "where a will pro-

vides for the payment of interest on a fund to a legatee till a specified time, and then for payment of principal to him, the presumption is, nothing appearing convincingly to the contrary, that the purpose of the testator was that the right to the fund itself should vest in such person at the time of the vesting of the right to the use." Page 335. In the devise of the estate to the widow and sister the element of time was not annexed to the devise itself as a condition precedent thereto, but was annexed merely to the time of the assignment thereof. The devise was absolute, and was to be enjoyed at a fixed time in the future. It therefore vested when the will took effect, namely, at the time of the death of the testator. *Ohse v. Miller,* 137 Wis. 474, 119 N. W. 93.

It appears that during the administration of the estate the executor, *George P. Miller,* paid to the First National Bank of Milwaukee $66,666.67, being the amount assessed upon the 1,000 shares of capital stock of said bank belonging to the estate. An assessment of sixty-six and two-thirds per cent. was levied by the stockholders of said bank upon all the capital stock thereof in order to make up the amount by which the capital of said bank had been impaired through the defalcation of its president, Frank G. Bigelow, who was named as an executor and trustee of the will of Henry C. Payne, but who resigned and left the trust to be executed by the present trustee, *George P. Miller.* The payment was made by the executor out of the *corpus* of the estate in his hands, and was in his account charged against *corpus.* The claim made by the defendant *Mrs. Cameron* is, that no profits declared by the bank should be paid the life tenant until the loss of the defalcation was made good from the earnings thereof. This is but another way of stating that the loss should be borne by the life tenant and not by the remainderman. The executor properly charged the loss to *corpus.* It was the capital of the bank—the *corpus* of the estate—that sustained the loss occasioned by the defalcation. By reason thereof the remain-

derman sustained a loss of $66,666.67 of capital and the life tenant sustained the loss of the income which would otherwise have been paid her out of that sum had it not been lost. It was not therefore necessary to reimburse the estate this amount out of earnings before dividends declared on the stock held by the trustee could be paid to the life tenant.

The St. Paul Avenue Improvement Company was incorporated in 1899 with a capital of $100,000 "for the purpose of buying and selling real property, improving and leasing the same, and doing of all other things which pertain to business of like nature." All the original subscribers, except one, were directors of the First National Bank of Milwaukee, and, for the purpose of helping said bank out of a difficulty, had taken over its interest in certain lands situated on or adjacent to St. Paul avenue in the city of Milwaukee. It was the intention of said directors to hold the lands until a favorable opportunity to sell presented itself. Upon the organization of the St. Paul Avenue Improvement Company the interests in said lands acquired by the directors were transferred to the company and it assumed all the indebtedness. It is stipulated that the lands were taken over by the company with the intention of managing them and disposing of them as soon as possible, paying up the indebtedness of the company, and dividing the proceeds that remained among the stockholders. In February, 1911, the company increased its capital stock to $200,000, the original incorporators taking their *pro rata* shares in such increase of the capital stock. Since that time its capital stock has been and now is $200,000. At the time the properties were acquired by the company they were largely unimproved and unproductive. The increase of the capital stock of the company was used prior to the death of Mr. Payne for the purpose of erecting buildings on the properties and in making other permanent improvements. Since the death of Mr. Payne no additional lands have been purchased nor have any buildings been erected on the company's

properties, with the exception of one building at a cost of $25,000. But since his death and down to the time of the declaration of the fifty per cent. dividend in question, the net income from the properties of the company from rents, interest, and dividends on stocks owned amounted to $47,540.65.

In December, 1905, the company made a contract with the Minneapolis, St. Paul & Sault Ste. Marie Railway Company for the sale of certain lands to it. It appears that the deal was not closed until sometime in January, 1911. January 4, 1911, the board of directors of the St. Paul Avenue Improvement Company passed the following resolution:

"Mr. Mariner reported that he had closed the deal with the Minneapolis, St. Paul & Sault Ste. Marie Railway and had conveyed to the Terminal Railway Company the lands which this company had previously contracted to convey and that he had received from it $105,318.75 and moved that the board of directors declare a dividend of 50 % upon its capital stock, payable immediately to its stockholders, which motion seconded by Mr. Pfister and unanimously carried."

It is further stipulated as a fact between the parties that the money distributed to the stockholders of the St. Paul Avenue Improvement Company as such fifty per cent. dividends were funds received from the Terminal Railway Company as the final payment upon its land contract for the purchase of a part of the properties of the St. Paul Avenue Improvement Company, which was entered into about December, 1905. This dividend of fifty per cent. was paid in cash and was the only dividend ever paid upon the stock of that company since its organization.

It is urged on behalf of *Mrs. Payne* that the St. Paul Avenue Improvement Company was organized for the purpose of dealing in real estate as a commodity, and that as such it had only two sources of profit, one being the net earnings of the company which are produced when the receipts from the properties exceed the carrying charges thereon, and the other, profits from the sales of its properties at figures in excess of

the cost thereof; and that both such sources of profits are to be considered as the earnings of such company. In support of this, reliance is placed upon *Read v. Head,* 6 Allen, 174; *Balch v. Hallet,* 10 Gray, 402; *Oliver's Estate,* 136 Pa. St. 43, 20 Atl. 527; *Thomson's Estate,* 153 Pa. St. 332, 26 Atl. 652, 653; *In re James,* 146 N. Y. 78, 40 N. E. 876.

In behalf of *Mrs. Cameron* it is claimed that while the articles of incorporation authorized the St. Paul Avenue Improvement Company to buy, sell, improve, and lease real estate of all kinds, yet it was not in fact a trading corporation in real estate; that it took these lands for the purpose of disposing of the same as soon as practicable and at such an advance in price as it might be able to obtain; and that the moneys received from the railway company for these lands represented simply an enhancement of the value of the *corpus* of the capital of the company, and not earnings in the true and ordinary sense of that term.

We deem the latter claim well taken. Any dividend derived from a mere enhancement of the value of assets representing capital from sources other than the accumulation of earnings belongs to the remainderman and not to the life tenant. It represents *corpus,* not income. *Kalbach v. Clark,* 133 Iowa, 215, 110 N. W. 599, 12 L. R. A. N. S. 801; *Holbrook v. Holbrook,* 74 N. H. 201, 66 Atl. 124, 12 L. R. A. N. S. 768; *Hite's Devisees v. Hite,* 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173; *Outcalt v. Appleby,* 36 N. J. Eq. 73; *Gray v. Darlington,* 15 Wall. 63; *Eisner's Estate,* 175 Pa. St. 143, 34 Atl. 577. To this rule there is a well known exception in the case of a corporation engaged in buying and selling real estate at a profit, and if the St. Paul Avenue Improvement Company could be considered a trading corporation in real estate within the meaning of the exception to the rule stated, the profits accruing to the corporation, whether derived from an enhancement in the value of real estate or from rents and profits in excess of cost of maintenance, would be considered

income and belong to the life tenant. True, the articles of incorporation of the company authorize it to buy, sell, improve, and lease real property, but it appears from the stipulated facts that this property was taken over by some of the directors of the First National Bank for the specific purpose of aiding the bank, and for the further specific purpose of holding and disposing of the same at the earliest opportunity and to the best advantage; that the company never bought any real estate after the death of Mr. Payne; that it sold property from time to time when it could do so to advantage; that its sole purpose was to close out all the properties as soon as practicable, distribute the proceeds among its stockholders, and dissolve the corporation. We have therefore come to the conclusion that this property was held by the corporation the same as any other property is held by an individual or corporation that desires to sell the same at an advantageous price, in the meantime making some improvements thereon and leasing the same to the best advantage. We deem that the company was not such a trading corporation in real estate as is referred to in the cases cited by counsel for *Mrs. Payne.*

It is urged that at least forty-seven per cent. of the dividend declared should go to the life tenant, because it appears from the undisputed facts that at the time the dividend was declared the net income from the properties of the company from rents, interest, and dividends on stocks owned amounted to $47,540.65, and that therefore it must be assumed that this amount of money derived from admitted earnings was included in the dividend declared. The difficulty with the claim is that it was stipulated by the parties that "the money distributed to the stockholders of St. Paul Avenue Improvement Company as such fifty per cent. dividend were funds received from Milwaukee Terminal Railway Company as a final payment upon its land contract for the purchase of part of the properties of St. Paul Avenue Improvement Company which was entered into about December, 1905." It therefore

appears that, while the company had funds derived from earnings out of which a dividend might be declared, the dividend in question was not declared out of such funds. We are here called upon to determine what disposition the trustee shall make of the dividend actually distributed. The fact that the company has on hand earnings out of which a dividend may hereafter be declared is immaterial so far as the present question is concerned. It follows, therefore, that the trial court properly held that the dividend of $100,000 declared by the St. Paul Avenue Improvement Company belonged to *corpus* and not to income.

Counsel for *Mrs. Cameron* admits that if it should be held that the trust estate vested at the time of the death of the testator, then the dividend declared by the National Surety Company should go to *Mrs. Payne,* as the undisputed proof shows it has been earned since that time. The conclusion reached as to the time of the vesting of the trust estate, and the admission of counsel, based as it is upon the undisputed facts, dispose of such dividend in harmony with the conclusions reached by the trial court.

The dividend of $532,617.12 declared by the First National Bank of Milwaukee to its stockholders on the 15th day of May, 1911, was charged against and paid out of the undivided profits of the bank. The fact, however, that it was charged against and paid out of a fund denominated undivided profits, is not conclusive between the life tenant and remainderman. *Soehnlein v. Soehnlein,* 146 Wis. 330, 131 N. W. 739. The claim is made in behalf of *Mrs. Cameron* that the dividend was never properly segregated from the *corpus* of the capital of the bank, because it was used to purchase a trust company which became an ancillary institution to it, and that it was not declared out of earnings made since the death of Mr. Payne.

It appears from the stipulated facts that all the stockholders of the First National Bank conveyed their interest in the

dividend in question to Fred Vogel, Jr., William Bigelow, and Fred T. Goll, as trustees, for the purchase of all the stock of the First Savings & Trust Company. Such conveyance by the trustee was consented to by both *Mrs. Payne* and *Mrs. Cameron*. The trust agreement provided for the holding and administering of all the stock so purchased for the benefit of all persons who were from time to time the stockholders of record of the First National Bank; and the evidence of ownership of the stock of the First Savings & Trust Company purchased with the dividend was indorsed upon the stock certificates of the First National Bank. As between remainderman and life tenant it is immaterial what the latter does with the dividend declared from income. *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739. He may, as here, enter into an agreement with the other stockholders to purchase a trust company, or he may not. The bank declared the dividend and paid it over to the persons designated by the stockholders to receive it. The bank parted with its control over the money and it was not concerned as to what use the stockholders made of it. Neither does it concern the remainderman what use the life tenant makes of earnings payable to him. The money in question was segregated from the *corpus* of the property of the bank and, in effect, paid to the stockholders, because paid to the persons lawfully designated by them to receive it.

Was the dividend derived from earnings of the bank accruing since the commencement of the trust estate? If it was, then it belongs to the life tenant; if not, to the remainderman; and if partly earned since and partly before the trust estate vested, then in part to each. *Soehnlein v. Soehnlein, supra*. The presumption is that a dividend declared on corporate stock is declared out of income, and an efficient showing to the contrary must be made to successfully rebut such presumption. *Soehnlein v. Soehnlein, supra*. The dividend in question purports to have been declared out of undi-

vided profits, and the burden therefore rests upon the remainderman to show that it was not. From the stipulated facts we reach the conclusion not only that the presumption has not been overcome, but that the proof is quite persuasive that the whole dividend was in fact paid out of earnings accruing since the commencement of the trust estate. The tabulation presented by counsel for *Mrs. Payne,* and based upon the stipulated facts, in our judgment shows that the whole dividend was derived from profits earned since the commencement of the trust estate. The tabulation is as follows:

Capital, surplus and undivided profits of bank on February 5, 1906, which included $256,651.28 of recoveries during first period, as per stipulation.	Capital	$2,000,000 00
	Surplus	350,000 00
	Undivided profits..	53,321 50
From February 5, 1906, to December 31, 1909, surplus and undivided profits were increased in the amount of.....		508,241 26
Of this amount recoveries on assets previously charged to profit and loss contributed.....		238,099 90
Leaving balance contributed by current earnings for the period.....		$270,141 36
From December 31, 1909, to declaration of dividend, surplus and undivided profits were increased other than from premium on new shares ($500,000 at 170) in the amount of.....		158,924 24
Of this amount recoveries on assets previously charged to profit and loss contributed.....		33,236 76
Leaving balance contributed by current earnings for the period.....		$125,687 48
Add to this the item of current earnings in preceding period		270,141 36
Makes current earnings since February 5, 1906, applicable to dividend.....		$395,828 84
At this point $500,000 new stock sold at 170 % as soon as sold had market value of 200 %.		
Old stock on date of sale of new stock had book value of 153.5 % and market value of 200 %.		
Proceeds of premium paid on purchase of new stock....		$350,000 00
Of this 53.5 % paid to make book value of new stock equal to book value of old, or.....		267,500 00
Leaving balance of premium as profit on sale of new stock applicable *pro rata* on old and new stock...		$82,500 00

After issue of new stock, old stock represented four fifths of outstanding stock.		
Four fifths of profit from premium on sale of new stock was applicable *pro rata* to $2,000,000 of old stock—four fifths of $82,500, or		$66,000 00
Add:		
Current earnings on old stock since February 5, 1906	$395,828 84	
Profit from sale of new stock applicable to old	66,000 00	
Total earnings and profits on old stock since February 5, 1906		$461,828 84
Amount of dividend actually declared, $532,617.12.		
Of this four fifths paid on account $2,000,000 of old stock (four fifths of $532,617.12) makes the dividend on old stock to be deducted from above total earnings and profits on old stock since February 5, 1906		$426,093 36
Leaves balance earnings and profits since February 5, 1906, on old stock after deducting dividend paid on old stock		$35,735 48

It will be observed that in this accounting recoveries made on assets previously charged to profit and loss account are deducted from earnings. Such deduction is properly made. Assets so charged off belonged to *corpus,* and whatever recoveries were made on them also belonged to *corpus.*

The distribution of the premium made on the sale of the new stock is an equitable and just one. Fifty-three and five-tenths per cent. of that went to make the book value of the new stock equal the old. The difference between that and 170 per cent., at which the new stock sold, represented a net profit to be distributed ratably between old and new stock. *Holbrook v. Holbrook,* 74 N. H. 201, 66 Atl. 124, 12 L. R. A. N. S. 768; *Eisner's Estate,* 175 Pa. St. 143, 34 Atl. 577.

Some claim is advanced that the profits made on the Colorado coal lands should be regarded as enhancement of the capital or *corpus* of the bank within the rule applied to the St. Paul Avenue Improvement Company. Such claim has no foundation in fact. The bank bought the lands like any other asset, sold them, and made a profit. Had it bought instead negotiable paper or bonds with the money invested in the lands and made the same profit, the legal situation would have been just the same. In either case the bank would have

made profits on assets purchased by it, and such profits belong to life tenant.

The trial court awarded *Mrs. Payne* the dividend of the First National Bank on 312½ shares of stock. This included sixty-two and one-half shares purchased by the trustee March 1, 1911. The dividend was declared in May, 1911. Her counsel now concedes that the amount of earnings on these sixty-two and one-half shares from the time of their purchase to the time the dividend was declared is too trivial to take into account, and that the judgment of the trial court should be modified by allowing her the dividend on only 250 shares of stock. The judgment is directed to be so modified.

It is apparent from the whole proceeding that a real and a *bona fide* dispute arose between *Mrs. Payne,* the life tenant, and *Mrs. Cameron,* the remainderman, as to how the dividends in question should be divided. It is also apparent that each of the parties, as well as the trustee, is interested in arriving at a just and fair settlement of such dispute. It is conceded that the value of the services of the trustee in this matter in behalf of the estate is $500. Under such circumstances the judgment of the trial court directing that the compensation of the trustee be paid equally out of *corpus* and income must be sustained. *Mrs. Payne* and *Mrs. Cameron* are each equally responsible for the existence, and equally interested in the adjustment, of the controversy. They should therefore share equally in the reasonable cost thereof.

By the Court.—Judgment modified as indicated in the opinion, and, as so modified, affirmed, without costs to either party. The clerk's fees in this court to be paid by the defendant *Mrs. Payne.*

A motion for a rehearing was denied October 8, 1912.

RICHTMAN and others, Respondents, vs. WATSON, imp., Appellant.

May 17—October 8, 1912.

Partnership: Assets: Real estate: Title taken by one partner: Resulting trusts: Implied trusts: Breach of faith: Waiver: Accord and satisfaction: Parol evidence affecting writing: Charitable trusts: Definiteness.

1. Real estate, not suitable for a particular partnership business nor intended to be or ever is used therein, does not become assets of the firm in equity by mere verbal agreement of the owner, for a consideration, with his partners in such business that it shall be considered such.
2. The foregoing is because, "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing." Sec. 2302, Stats. (1898).
3. Real estate, purchased with partnership money, actually or constructively, for partnership purposes, belongs to the firm though the title be taken in the name of one partner with or without the consent of his associate.
4. If a person purchase land with money of a partnership given him to buy land for the members to hold as tenants in common, taking title in his own name by previous consent, or subsequent acquiescence, the partners cannot claim it on a resulting trust.
5. The rule above stated is because of the abrogation of resulting trusts. Sec. 2071, Stats. (1898).
6. If a person deposit money with another to buy land for such person or to hold upon a charitable trust for a class, and such other invests the money, taking title in form as owner, involving a breach of good faith, an implied trust is created in favor of such person or such class according to the facts.
7. In the circumstances last stated, if the purpose of the deposit is for the depositee to invest the money in property to be held for a class, and a breach of faith committed by not having the deed show the facts be waived by the depositor, that does not

affect the title; as to him, in case of the breach being against the depositor it changes the implied trust into the common-law field of resulting trusts, leaving the depositor no remedy but to recover back the money, because there is no implied trust, strictly so called, without breach of faith and no enforceable resulting trust.

8. Where two persons close an accord and satisfaction by a contractual receipt in writing, it cannot be varied, contradicted, or explained by verbal evidence.

9. The rule as to trusts requiring definiteness of scheme and of beneficiaries who can enforce it, does not apply to charitable trusts.

10. In case of a trust for charity, individual beneficiaries may be uncertain and the particular object vague, the latter may be single or broad, only stopping something short of general charity. So the class may be great or small and there may be vagueness in many respects without jeopardizing the trust.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Walworth county: LAWRENCE W. HALSEY, Judge. *Reversed.*

Equitable action to establish title in plaintiffs to an undivided three-fourths interest in certain lands, charge defendants *Wingfield Watson* and Elizabeth White as trustees of such title for plaintiffs, and compel conveyance thereof to them.

The facts upon which plaintiffs grounded their claim are indicated in the epitome of the findings hereafter given.

Defendant *Watson* joined issue as to all allegations in the complaint which, if true, would support plaintiffs' theory as to his holding title in trust for them, and pleaded this: The greater part of the purchase money of the lands in controversy was furnished by defendant Jacob Richtman, father of plaintiffs, under an agreement that it should be invested in land for the welfare of a religious sect, known as the Strangite Branch of the Church of the Latter Day Saints, particularly for any such as might be needy, and the lands have been, and so far as not disposed of are, held upon such trust. The title was, in form, taken in the name of said *Watson* with said

Richtman's consent at the time, or given immediately thereafter. Plaintiffs, after the purchase, became fully informed of the facts and acquiesced therein. Such situation was maintained for years after with approval of plaintiffs and defendant Richtman. The purchase was made without any knowledge that plaintiffs were interested as partners or otherwise in the money furnished therefor. Such money was received for the purpose for which it was used, and all acts in regard to the matter were performed without intent to deceive any one. It was not partnership money nor invested to hinder or delay creditors of defendant Richtman and plaintiffs as partners, nor was fraud intended or perpetrated on such creditors or plaintiffs; but the sole purpose was to hold the title to the lands in trust as before indicated, in which purpose defendant Richtman joined and plaintiffs acquiesced with knowledge of the facts. The deeds sought to be impeached were duly recorded soon after being made and the grantees therein immediately entered into possession of the premises and have ever since so remained, covering a period of more than ten years, adverse to any personal claim of plaintiffs, thus satisfying the statutes of this state as to title by adverse possession, particularly secs. 4211, 4212, 4214, and 4215 thereof. For more than thirteen years prior to commencement of this action plaintiffs knew of such possession and made no objection thereto.

The issues were thus closed: In the spring of 1895, at Sterling Island, state of Missouri, defendant Richtman and plaintiffs, his three sons, formed a copartnership in constructing and operating steamboats and barges on the Mississippi river and its tributaries, taking and executing contracts for river improvements and in mercantile business,—they to be equally interested in all property put into such business and the firm to be responsible for all existing individual liabilities; which property then consisted, in part, of a land contract interest owned by said defendant Richtman in agri-

cultural land, described in the complaint, located near Burlington, Wisconsin, called the "Webber" land, the title to which, pursuant to such contract, was, in June, 1895, conveyed to him, but never to the partnership or members thereof.

Such partnership ended in 1903, all accounts in the meantime being kept and funds handled by defendant Richtman, and all property used in the business, prior to such termination or soon thereafter, used in paying firm liabilities.

After the formation of the partnership and before purchase of the lands in controversy, it was agreed to invest the profits of the business in real estate in the vicinity of Burlington, Wisconsin, for the individual members, so that each might acquire, in his individual right, a farm, none of the land to be taken as partnership property or used in the partnership business, and the lands in controversy were purchased pursuant thereto.

Pursuant to such agreement partnership profits were deposited with defendant *Watson* and therewith he acquired the particular lands. He took title to the land purchased in his own name and has since retained the same, except a portion deeded to his daughter.

Defendant Elizabeth White, without knowledge of her father's actual interest in the land, took title and subsequently, without such knowledge, made valuable improvements on the land.

Watson contributed $2,000 in buying the land and the balance, $8,350, was made up of firm money deposited with him by defendant Richtman pursuant to the agreement aforesaid.

Watson took the title without intent to claim the property in his own right, or prior authority from the copartners, or any of them, but as matter of convenience in dealing with the property,—not upon the trust claimed in the answer.

Prior to 1900 the partnership business was profitable; but

it then became financially embarrassed and defendant Richtman, without consideration, conveyed the land to *Watson*, which, for eight years, he had theretofore occupied under a written lease from Richtman, paying rent therefor, and so continued till 1906, when the property was sold for $9,300, he receiving the proceeds, and thereafter, March 14, 1907, paying members of the former partnership $3,000 for use in discharging its debts, and May 22, 1908, paying defendant Richtman $3,000 for the same purpose, using $1,000 to satisfy his alleged claim against such defendant for borrowed money, $2,000, to loan upon note and mortgage to said defendant and wife, $300 to deposit in bank,—the loan and deposit being in his name.

He has had the use of the land in controversy since March 1, 1907, and whatever consideration was paid by his daughter, but has kept up the taxes, though neither the amount received for such use nor such consideration, nor amount paid for taxes, appears from the evidence.

Prior to 1905, neither of plaintiffs knew of the status of the title to said land, and when they learned that *Watson* held the same they were informed by him and defendant Richtman, and believed, that he so held for the use and benefit of the religious sect to which all parties belonged, known as the Strangite Branch of the Church of Jesus Christ of the Latter Day Saints, and were not informed that the title was in his name, in form, as individual property until 1910.

He has not claimed and does not claim the title in his individual right, and did not assert, till December 22, 1900, to hold the same in trust as alleged in the answer; but pretended to do so as matter of convenience in handling the property.

The trust upon which *Watson* claims the land has not been declared in writing, except by the answer herein, neither have the beneficiaries thereof been sufficiently indicated, nor any method for their ascertainment, nor its object been made

sufficiently certain to enable a court of equity to enforce execution thereof, and it is too intangible and indefinite to be carried into execution.

Watson has not changed his position in respect to the land; relying on acts or conduct of plaintiffs in respect thereto.

Upon such facts these conclusions were reached: The action should be dismissed as to defendants White. The trust under which *Watson* claims the lands is void. He holds the legal title, so far as not parted with to his daughter Elizabeth, in trust for plaintiffs and defendant Jacob Richtman as tenants in common, subject to an equitable lien for $2,000 in his favor, less any amount realized from the property in excess of taxes and other charges which he has paid. The implied trust upon which he holds the title should be executed by appropriate conveyances, each interest to be subject to its proportionate share of the amount of *Watson's* lien, to be determined by an accounting in the case. In case of failure to so execute the trust the judgment should operate to pass title in lieu thereof and a certified copy thereof be duly recorded to perfect the title of record. Judgment was entered in accordance with such conclusions.

For the appellant there was a brief by *Louis H. Rohr,* attorney, and *Simmons & Walker,* of counsel, and oral argument by *Mr. John B. Simmons* and *Mr. Rohr.*

For the respondents there was a brief by *M. L. Fugina* and *Webber & Lees,* and oral argument by *Mr. Fugina* and *Mr. Edward Lees.*

The following opinion was filed June 4, 1912:

Marshall, J. The real facts in this case are not in serious dispute on the evidence, and the controversy is governed by familiar principles of written and unwritten law.

The first proposition is this: If a person, having real estate, verbally forms a copartnership with others to conduct a particular business, such real estate being remote from and not

suitable for nor intended to be used as such, or in any form, in such business, agrees that it shall be considered part of the partnership property, does that transfer the title thereto in equity so that such partnership or the members thereof can acquire the legal title, adverse to such person or those claiming under him, or the proceeds of the property, in case of such person having changed such property into some other form, or his grantee with notice of the facts having done so?

The stated proposition is involved in the first finding excepted to and the inferences which the trial court drew therefrom. It is ruled in the negative by sec. 2302, Stats. (1898), providing that "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands or in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing."

The case should not be confused with those where real estate was bought with partnership money for partnership purposes or as an incident to its business. As in *Kyle v. Carpenter,* 130 Wis. 310, 110 N. W. 187. The position of counsel for appellant is sound on that subject. Nor does it fall within the class covered by the language "by act or operation of law." The proposition contemplates an act by the parties only, involving an agreement of no higher dignity than to deal in real estate which has been many times declared void. *Bird v. Morrison,* 12 Wis. 138; *Langley v. Sanborn,* 135 Wis. 178, 114 N. W. 787. No authority is produced which sustains, at all, the affirmative of the proposition, and it is clear that it is not sustainable. So we pass to the second point.

If a person, in forming a partnership with others, to conduct particular business, either at the time thereof or thereafter, pursuant to a verbal agreement, then or thereafter made

with his associates, from time to time takes a part of the net earnings of the business, not thought to be necessary thereto, and deposits the same with another to be invested in real estate, not suitable for or intended to be used in the partnership business, but to be owned by the members as tenants in common, and such other invests the money pursuant thereto, either taking the title in his own name by their consent or his act in that regard is subsequently ratified; do the owners of the money so invested thereby become equitable owners of the land as tenants in common?

The court found facts satisfying the elements of the proposition stated as to the particular land in controversy except that of taking title by *Mr. Watson* in his own name by previous consent or subsequent ratification. The only finding thereon is that plaintiffs did not know anything about the state of the title till 1905 and were then informed that it was held by *Mr. Watson* for the benefit of the persons belonging to the particular branch of the Mormon Church to which all parties belonged. The findings are to the effect that they did not learn all the facts as to the title till some time after 1905. Inferentially, from the findings, plaintiffs acquiesced in the situation in 1905 with that understanding that the title was held by *Watson* as he then claimed, which is in accordance with the undisputed evidence. Moreover, letters written by the respondents before and after 1905 show that they made no personal claim to the land. On the whole the record shows that all the business in relation to the matter was left to Mr. Jacob Richtman; that he knew all the facts and acquiesced therein, and conclusively indicates, in our judgment, that it was expected the title to the land would be vested in some one person. So the proposition embodies the facts as they appear from the findings and the substantially undisputed evidence.

While it seems clear there was consent to vesting of the title in *Mr. Watson* before the land was purchased, at least in trust for the members of the religious sect to which all the

parties belonged, and the only mistake made, if any, was in not having the deed show he held in trust, the subsequent ratification was equivalent to prior consent. The facts showing acquiescence seem clear, and the law likewise clear. In *Bosworth v. Hopkins,* 85 Wis. 50, 59, 55 N. W. 424, subsequent acquiescence was treated, as matter of course, equivalent to prior authority, and that is elementary.

The proposition explained, as indicated, is ruled in the negative by the statute before referred to as regards the respondents having any right to the land in controversy as tenants in common. On that the court has before spoken. *Clarke v. McAuliffe,* 81 Wis. 104, 51 N. W. 83; *McMillen v. Pratt,* 89 Wis. 612, 630, 62 N. W. 588; *Seymour v. Cushway,* 100 Wis. 580, 76 N. W. 769.

The proposition is also ruled in the negative by sec. 2071, Stats. (1898), abolishing resulting trusts. Formerly if a person deposited money with another for the purpose of having such other invest the same in land, and the purpose of the deposit was executed, title being taken in such other by consent of such person, a trust resulted in favor of such person enforceable in equity. The case in hand should not be confused with those decided where or when the old rule prevailed recognizing resulting trusts creatable by acts of the parties. The statute was expressly designed to abolish such trusts. It provides that "When a grant for a valuable consideration shall be made to one person and the consideration therefor shall be paid by another, no use or trust shall result in favor of the person by whom such payment is made; but the title shall vest in the person named as the alienee in such conveyance" (sec. 2077, Stats. 1898), subject to a constructive trust in favor of creditors under sec. 2078 in case of intent in the transaction having been to defraud them. True, to bring a case within this section, there must be the element of prior consent or its equivalent,—that must not be lost sight of; but there was such here, it seems, as before indicated, by

necessary inference from the findings and the undisputed evidence.

Neither the conclusions of law nor the judgment goes upon the ground that *Mr. Watson* held the property in trust because it was partnership property; the findings negative that; but because it was bought with money set aside to buy land for the individual members of the partnership. It seems to have been thought that, in any event, whether *Mr. Watson* took title in his own name by consent or not, he became a trustee and would remain so unless respondents lost their right to charge him as such by laches or the statute of limitations. The findings on the subject seem to treat the time when knowledge came to respondents merely in respect to whether they were guilty of fatal laches.

The conclusions of fact are to the effect that *Mr. Watson* held the land in controversy upon an implied trust for respondents and their father. There could be no such thing as an implied trust without some element of fraud,—such as *Mr. Watson* taking title in violation of an agreement that it should be vested in the owners of the money,—the respondents and their father, if they were such, or in himself as trustee for the members of the branch of the Mormon Church to which all belong. Then there would be an implied or constructive trust by the common law, sometimes confused with resulting trusts, strictly so called, mentioned in sec. 2077. There was no breach of confidence in this case as to respondents personally, if we read the evidence right; but, if it be otherwise, the breach as to them was waived long before this action was commenced. If there were any breach as to the members of the sect to which the parties belonged, it was also waived as to respondents personally, and, in any event, the right of action to enforce the implied trust did not accrue to them.

The opinion may be read, up to this point, upon the theory that the evidence may be regarded as sustaining the finding to the effect that, by verbal agreement, money was deposited

with *Mr. Watson* to buy land for the benefit of the members of the partnership as tenants in common and that the land in question was purchased accordingly, the title being taken in *Mr. Watson* by previous understanding, implied from the whole situation, though not with actual knowledge of all the facts; but, in any event, with subsequent acquiescence in its not having been taken in the names of respondents and their father or any of them; but, we quite agree with counsel for appellant that there is no satisfactory evidence that partnership money was so deposited with such understanding and that the findings are all wrong in respect to that matter. In fact, as we read the record, it is all one way, that the money deposited with *Mr. Watson* for investment was regarded by all as tithing money to be held and invested for the use and benefit of the sect to which all belonged. Jacob Richtman, who did all the business with the knowledge of respondents and makes no complaint, united with *Mr. Watson* in so testifying. The evidence of respondents and their letter indicate clearly the same thing.

Mr. Watson was induced to remove from Michigan to Wisconsin by the elder Richtman to do just what he did do, and he carried out the plan agreed upon with strictest fidelity, as it seems, for many years. He was recognized as substantially the head of the sect with authority to exact, collect, use, and invest tithings, for its benefit. All were parties to the arrangement. To give a full history of this would take much space, and it will be omitted. Suffice it, in the main, to say that the evidence leaves no reasonable doubt on the question, and the findings, in the latter part, seem to fairly recognize that they could not have been at all fairly framed without taking note of this phase of the case, and so it was done after the first few paragraphs as to the money invested in the land having been deposited with *Mr. Watson* to buy it for the members of the partnership as tenants in common.

Even in the first part of the findings, as we have seen, re-

spondents made no complaint upon learning that the land had been bought for the benefit of the members of the sect and till they found out that the deed did not show that fact. Jacob Richtman testified fully to the effect that he did all the business with *Mr. Watson* and acquiesced in his doing as he did. The idea that there was any breach of faith in the matter by Jacob Richtman or *Watson* is negatived by both in the most emphatic way. Neither of respondents made any claim to having any interest in the land for years, but on the contrary, in writing, declared that they had none. Both *Mr. Watson* and Mr. Jacob Richtman said that the purchase money was mainly collections for church dues. Respondents admitted they knew there were dues being sent to *Mr. Watson,* and that they submitted to being thus burdened.

The record, from beginning to end, shows there were business transactions between *Watson* and Jacob Richtman in connection with the church matters, whereby, on the whole, private means of the latter, the tithing money, and the former's private funds became confused together, leading to some sharp differences of opinion, in time, between the two men as to the exact situation, which, in the end, were settled, as we shall see.

No further time will be spent on the branch of the case relating to the character of the money invested by *Mr. Watson;* but we repeat again that the finding that the land in controversy was bought with partnership funds deposited with him for investment, as suggested in the findings, is contrary to the evidence.

The record shows that after the differences had arisen as aforesaid, which were well known to respondents, and long after *Mr. Watson* had paid Jacob Richtman $3,000 received out of the Webber farm, mentioned in the findings,—paid not thinking it was due him, all the money as he thought having been given to buy land for the benefit of the members of the sect to which all belonged,—the two met for the purpose of

making a full settlement. That the purpose was to close up all differences, is evident from what occurred and from the evidence of both—Mr. Richtman acting as he had always done, in his own name, but as head of the Richtman family. Respondents knew his manner of doing business and made no protest. Their whole attitude was that of acquiescence in such matter. At this meeting *Mr. Watson* insisted that Mr. Richtman owed him $1,000 of borrowed money, and the latter claimed he should be paid a considerable sum by the former,—thinking particularly of the money received out of the Webber farm sale some two years previously. Finally Mr. Richtman proposed to call the credit that should be allowed him $4,000 and that, if a settlement were made on that basis, *Mr. Watson* might have any one in Burlington, Wisconsin, draw up a receipt covering all dues and demands whatsoever up to date and he would sign it. That was agreed to with the modification that the latter should be allowed out of the $4,000 the $1,000 of borrowed money. The settlement so agreed upon was carried out, *Mr. Watson* paying Mr. Richtman $3,000 and the latter signing and delivering to the former a contractual receipt in the following words:

"Nauvoo, Illinois, May 22, 1908. This is to acknowledge receipt of *Wingfield Watson* of $1 and other good and valuable consideration in full payment, discharge and acquittance of all charges, claims and demands against him of whatsoever kind or nature, and I do hereby acknowledge that all accounts and claims between us have been fully discussed, considered and settled and this is a full discharge and settlement thereof.

"In the presence of JACOB RICHTMAN.
"Albert Ketchum.
"August Blum."

That, since Mr. Richtman in this transaction, clearly, by the implied assent of respondents, represented them as well as himself, the paper signed made a settlement which could not be impeached except for fraud or mistake, seems clear.

Such is the rule respecting such contracts. *Conant v. Estate of Kimball,* 95 Wis. 550, 70 N. W. 74.

It seems the whole case might well have been disposed of below, and might be here, on the mere history leading up to the execution of the receipt and such execution. Manifestly, everything was intended by Mr. Richtman, who had done all the business with *Mr. Watson* on behalf of himself and family, and by *Mr. Watson,* to be included in the settlement. The former loyally stands by such settlement and makes no claim to the land in question and never has in the sense insisted upon by respondents, yet, singular as it may seem, the trial court awarded him an interest therein equal with respondents. The theory upon which that was done is not perceived.

Notwithstanding the opinion might, as indicated, stop here, it seems best to take notice of some other features of the case. There is a finding that the trust, considering the answer as a declaration in writing in respect to it as to facts therein stated, is void for want of sufficient indication of beneficiaries, or any method for ascertaining them, and because the object is not sufficiently ascertainable to enable the court to enforce it. In that the court fell into the old confusion between charitable and private trusts supposed to have been entirely eliminated from our jurisdiction in *Sawtelle v. Witham,* 94 Wis. 412, 69 N. W. 72; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Kronshage v. Varrell,* 120 Wis. 161, 97 N. W. 928; *Kavanaugh v. Watt,* 143 Wis. 90, 126 N. W. 672; and other cases.

The trust in this case is a charitable one, if any. *Mr. Watson,* according to the record, holds the title for the general welfare, in a broad sense, yet limited to some extent, of a particular class of persons *in esse,* which may be changed by dropping out or coming in of members in the natural course of events, but ascertainable at any time, *in præsenti,* by the head of the sect.

Indefiniteness, to a large extent, is one of the characteristics of a charitable trust. "Indeed," as said in *Sawtelle v. Witham,* "vagueness is in some respects essential to a good gift for . . . charity." Courts will not allow such a trust to fail because the objects of the charity are uncertain. The individual beneficiaries cannot well be named. The class may be very small or very large, as said in the cases cited, so may be the purpose. It may be single or may be broad to anything less than general charity, as said in *Kronshage v. Varrell.* If the general limits of the purpose, however broad, within the boundaries mentioned, and also the class, be reasonably ascertainable by the most liberal methods which can be devoted to the matter, though there be great indefiniteness in mode of carrying out the purpose and there be absence of details or even a trustee who is willing to act, and in some cases a trustee at all,—so long as the purpose is within the field of charity in the broadest sense,—the trust is a good one and a way can be found of carrying it out, as said in *Harrington v. Pier.*

The trial court made the findings of fact entirely misconceiving the law in respect to the trust matter. If they were correct they would likely jeopardize many trusts existing and prevent many which would be otherwise probable or possible in the future. Courts tread on almost consecrated ground, so to speak, when dealing with the law of charitable trusts. The subject did not necessarily have anything to do with this case. But being injected into it, occasion has been taken to make observations at some length to prevent the history of the case in the record operating to mislead.

The finding just condemned was doubtless supposed to be essential to a decision in favor of respondents because of previous findings and evidence indicating acquiescence in the state of the title so long as they thought it was held upon a valid trust for the members of the sect to which all belonged.

The case on that subject seems to have been too strong, as before indicated, to be ignored; so, the finding was made to the effect that, if the lands were taken upon a trust, as *Mr. Watson* claimed, and respondents ratified it by not objecting so long as they in good faith supposed he so held the property of record, the trust, in fact, was void.

If it were true that the trust was void as stated in the findings, it is not perceived how that would help respondents. In that case the title to the land would be in *Mr. Watson,* as we have seen, discharged of the trust. It would not, to any extent, fall to them and Jacob Richtman as tenants in common, as evidently the trial court supposed, by reason of their furnishing part of the money to buy the land.

There are some other questions, incidentally discussed in the briefs of counsel; but what has been said covers all which from any viewpoint we think best to treat.

By the Court.—The judgment is reversed, and cause remanded with directions to dismiss the same with costs.

Timlin, J., dissents.

A motion for a rehearing was denied October 8, 1912.

WILL OF RICE: COWIE and others, Appellants, vs. STROHMEYER, Executor, and others, Respondents: SAME, Respondents, vs. SAME, Appellants.

May 17—October 8, 1912.

Wills: Probate: Contest: Questions involved: Evidence: Jurisdiction: Appeal from county court: Judgment: Validity: Constitutional law: Right to make will and have it carried out: Substitution of different scheme by parties interested: Termination of trust: Persons under disability: Change of venue: Parties: Executors: Settlement of accounts: Organizing equitable action on appeal: Bringing in parties: Time for taking appeal: Issues: Payments by order of court: Personal liability: Setting aside orders: Waiver: Estoppel: Minors: Attorneys: Guardians ad litem: *Compensation: Appeal to supreme court: Reversal: Directions for judgment.*

1. In a will contest, only evidence bearing on legality of execution, testamentary capacity, and whether the instrument purporting to be the particular person's will is such in fact, is legitimate.
2. A will contest cannot, properly, be turned into an action for construction, reformation, or rescission, since the sole question is whether the paper purporting to be the will of the testator represents his legally declared final wishes as to the *post-mortem* disposition of his estate.
3. On appeal from an order admitting a will to probate, the scope of judicial power is limited by the nature of the proceeding and the rights involved.
4. Parties interested in a testate estate are not competent to substitute their will for that of the testator so as to have the former carried out as if it were the scheme of the latter, and the court is powerless to give validity to any such scheme.
5. Notwithstanding fatal jurisdictional error within the scope of judicial power as to a particular subject matter, the determination involved is conclusive between the parties and their privies respecting collateral attack.
6. In case of error by acting beyond judicial power, the result is a usurpation and not binding on any one.
7. Whether a judgment is jurisdictionally bad for judicial error instead of for excess of power, turns on whether the court had jurisdiction of such subjects as the one deliberated upon.
8. Jurisdiction of the subject matter has reference not only to nature of cause of action and relief sought, but judicial power

of the court, referable to its organic act and other enabling written laws.

9. A cause of action or matter legitimately deliberated upon, may, within the scope of the court's subjects of jurisdiction, be as broad as parties make it by pleadings, argument, or evidence admitted without objection, but if the court goes beyond that its determination is *coram non judice.*

10. The abstract question in any particular case as to whether the property of a deceased person shall be distributed according to the wishes of the parties interested, or claiming to be so, instead of according to the written law or the will, is not of judicial cognizance.

11. The right to make a will is more sacred than that to make a contract; the former being beyond judicial power to disturb on equitable grounds while the latter is not.

12. The right to make a will was recognized as one of first importance when the constitution of Wisconsin was adopted and enjoyment thereof was guaranteed thereby.

13. Inherent in the right to make a will there is a constitutional right to have one which is validly executed carried out according to the intent of the testator.

14. Proceedings to obtain admission of a will to probate constitute an action *in rem* to establish status to which the public is a party; but without capacity to substitute any scheme of distribution for that of the testator.

15. Upon the person designated according to law to propose a will for probate performing his duty, judicial doors open for that particular purpose only of passing upon such proposition.

16. A will in possession of the proper county court for determination of its admissibility to probate, being a subject of an action *in rem* in such court, the thing is provable or disprovable according to law and as regards whether it is what it purports to be; if proponent and persons interested drop out the subject of the action remains to be dealt with, the court's sole function being to determine legality of execution and genuineness of testamentary declaration.

17. In general, all interested in trust property, if *sui juris*, may, by agreement, terminate the trust.

18. The rule last stated does not apply where any of the parties are under disability, or where the settler made known, expressly or plainly, his intention that such power should not exist.

19. Excluding merely nominal parties, all who have appeared in an action and are interested on the same side, though not necessarily on the same side of the record, constitute one party as

to making application for a change of venue, and must join to satisfy sec. 2625, Stats. (Supp. 1906: Laws of 1905, ch. 282).

20. In an appeal from a final order settling an executor's account, all persons adversely interested may be brought in and the proceedings organized as an equitable action to settle the dominant controversy and all others germane thereto; the persons appearing being arranged as plaintiffs or defendants according to their actual attitude, as near as practicable.

21. In the situation last stated persons who have wrongfully possessed themselves of portions of the trust fund may be brought in and appropriate redress afforded.

22. In case of probate proceedings had in due course for the distinct purpose of determining the amount to be allowed to an executor as counsel fees and an order being minuted on the court journal intended to finally close the matter, the right of appeal commences to run from that date.

23. The rule last stated does not apply to a presentment involving jurisdictional error or extra-judicial elements indicating that the determination was not a final judicial determination of the judicial questions or a mere preliminary determination to be followed by a final order.

24. A county court order entered on due presentation with opportunity for parties to be heard, and ordinary advisory orders as regards business management of an estate, acted upon in good faith by an executor or administrator, protect such executor or administrator from personal liability.

25. Time for appealing from a final determination in county court, made in due course in the administration of an estate, dates from such determination whether embodied in a formal order or merely minuted upon the court journal.

26. A court memorandum, made in a hearing, on application for settlement of an executor's final account and preliminary to the final order, as to the amount to be allowed for attorneys' fees and compensation of guardians *ad litem*, does not set time running to appeal from an allowance in harmony therewith by such final order.

27. A contract between attorneys and representatives of persons not *sui juris* and others,—beneficiaries of a trust fund held by an executor,—requiring such attorneys to guard the fund against undue depletion, yet stipulating for such attorneys, compensation equal to the amount the court shall allow adversary attorneys, making it for the pecuniary interest of the former to have such amount placed high and their duty to have it placed as low as practicable, is contrary to public policy, not binding

on the beneficiaries, especially those who are *sui juris*, and does not create any legitimate basis for the court to act upon.

28. If an executor acts, reasonably, and in good faith in the disbursement of money pursuant to an order of the supervising court within its jurisdiction to make, he is protected thereby from personal liability.

29. An executor who pays out trust funds pursuant to the court's direction outside the scope of any subject matter of such court's jurisdiction is personally responsible therefor.

30. Beneficiaries of a trust fund who by mistake as to their own rights or authority over such fund consent to improper disbursements therefrom to attorneys and guardian *ad litem* for past services, are not estopped from insisting upon a restoration of the fund; especially is that so as to beneficiaries who are not *sui juris* and represented by guardians having no right to stipulate away their rights.

31. If an executor, in good faith, disburses money of a trust fund pursuant to an order, bad for error, such order if seasonably and properly challenged, may be set aside or corrected so as to permit following the fund and recovering from the parties who received the money, but not so as to charge the executor personally.

32. Waiver does not require any consideration, lost or gained, to support it, but does require capacity on the part of the alleged waivor to give away his rights.

33. In the absence of bad faith, neither the doctrine of estoppel nor that of waiver applies to minors.

34. On a general appeal from the final judgment in the settlement of an estate in county court, the circuit court becomes possessed of the whole subject matter involved in such order and may make all persons parties necessary to a final settlement or who should be present for their due protection, and the issues cannot be so narrowed by pleading or consent as to interfere with judicial competency as to the parties under disability, to decide any matter required by the evidence to be decided to fully redress the dominant wrong and all others subsidiary or germane thereto.

35. Legitimate counsel fees for the executor in an administration matter are, in general, limited to fair compensation for services reasonably required to be done and actually performed, commonly done by one attorney, or firm of attorneys.

36. Attorneys for beneficiaries under a will who intervene and assist in the administration of an estate are not entitled to be paid for their services out of the trust fund, and representa-

tives of beneficiaries who are not *sui juris* have no authority to stipulate to the contrary.

37. The duties of guardians *ad litem* in the settlement of an estate are, in general, merely advisory and supervisory; they have no authority to stipulate away any part of the trust fund, or to intervene and do the work of the executors or their attorneys at the expense of the estate.

38. When this court, upon a reversal, can best promote justice by giving such precise directions as to the proper judgment to be rendered as will speedily terminate the litigation it will do so.

39. Where the whole history of an entire subject matter, including a dominant feature and many others subsidiary or germane thereto, in the entirety affecting many persons who are parties, or may properly be made so, and the controversy, in general, is opened by a reversal on appeal to this court, the broad superintending control power, supplementing appellate jurisdiction, affords the court ample opportunity to give the full directions suggested in the last foregoing.

[Syllabus by MARSHALL, J.]

On motion for modification of mandate:

40. The court having jurisdiction of supervising a trust may provide for payment out of the trust fund for reasonable expenses in protecting the trust.

41. Reasonable attorneys' fees for services actually and rightfully rendered, doing that which is reasonably necessary in conserving a trust estate, are allowable to the trustee as expenses, and may be allowed direct to the attorney, chargeable to the trust fund; and such services may be so compensated when, from the necessities of the case, they are rendered at the request of the *cestuis que trust* acting in place of the trustee.

42. The amount of the compensation to be allowed in such cases is always within the discretion of the court, not controlled by contract, and should be determined with reference to the reasonable necessity for the services, the amount and nature thereof and the extent of the resulting benefits, and should be fixed upon the basis of compensation for somewhat similar services in official life, rather than the customary charges as between attorney and client.

43. Ordinarily the supreme court will not go further than to fix the compensation for services rendered on appeal, leaving the court below to deal with the matter of services rendered there; but in extraordinary cases the higher court may cover the entire field, terminating the litigation in all respects.

Appeals from a judgment of the circuit court for Waukesha county: Martin L. Lueck, Circuit Judge. *Reversed as to one appeal. Appellants as to the others to take nothing thereby; but, pay costs.*

In January, 1905, and at the time of his death in 1906, John A. Rice possessed a fortune around $175,000 in value. He had a daughter, *May R. Cowie,* and three grandchildren by her,—*May R. Cowie,* referred to in the will as *Pussie Cowie, Lloyd R. Cowie,* sometimes referred to as *Beebe Cowie,* and *Gordon Cowie;* also a son and three grandchildren by him,—*Lulu C. Rice, Rhea Frances Rice,* and *Magdalena Grace Rice.* At the time of the proceedings hereafter mentioned the son had deceased leaving a widow, *Delia Rice.* The grandchildren, when such proceedings occurred, were minors, except *Lulu C. Rice, Rhea Frances Rice,* and *Gordon Cowie.* In due time, *Delia Rice* was appointed general guardian for *Magdalena Grace Rice,* and *Henry Lockney* was appointed her guardian *ad litem. May R. Cowie* was appointed general guardian for her minor daughter *May R. Cowie,* referred to sometimes as *Pussie Cowie,* and her minor son *Lloyd A. Cowie,* sometimes referred to as *Beebe Cowie,* and *G. Holmes Daubner* was appointed their guardian *ad litem.*

Mr. Rice died testate in Waukesha county, August 18, 1906. His will was dated January 9, 1905, and, omitting the introductory and attesting parts, is as follows:

"FIRST.

"I give and bequeath to *Geo. W. Strohmeyer* and *Libbie Allerdice,* the first being the president of the Milwaukee National Bank, and the second my faithful housekeeper for many years, all the estate both real and personal of which I may be possessed at the time of my death.

"To be held in trust for the uses and purposes hereinafter named—and they shall not be required to give any bonds or to file any schedule of my said estate. To buy and sell, to invest and re-invest any and all monies, stock, and bonds

which may belong to my estate, and in case of the death of one of said trustees the other may appoint, with the advice of the court, a successor who shall have the same authority as the deceased trustee, and that no inventory of my estate be filed in any public office.

"SECOND.

"It is my will that in case my daughter *May R. Cowie* is left a widow during the life of this trust she shall receive from my estate the annual sum of five hundred dollars, and at the expiration thereof if a widow to receive the sum of two thousand dollars.

"THIRD.

"I give and bequeath to my son Frank Rice the annual sum of two hundred dollars to be paid out of the income of my estate during his natural life and also such books from my library as he may select.

"FOURTH.

"My grandson *Beebe Cowie* shall receive the annual sum of one hundred dollars for the term of five years after my death, to be paid out of the income of my estate by the said trustees.

"FIFTH.

"I give and bequeath to my granddaughter *Lulu Rice* the annual sum of two hundred dollars, and to the other two daughters of Frank Rice and sisters of the said *Lulu Rice* the annual sum of one hundred dollars.

"SIXTH.

"I request and direct that my said trustees erect a family monument of granite, on which shall be inscribed my name with date of birth, together with the names of my deceased wife, Caroline I. Rice, and my son William A. Rice, May Rice, and Jackie Cowie, and direct them to expend in said monument a sum not to exceed four thousand dollars.

"SEVENTH.

"It is my will that my said trustees keep all the residue of my estate invested in the best possible manner until the death of my son Frank Rice, when this trust shall cease unless he should die before the youngest grandchild named above reaches the age of thirty years, and upon his death, or when the youngest grandchild reaches the age of thirty years, then

all the remaining residue of my estate shall be equally divided among the three children of my son Frank Rice. To make this plain, this trust shall continue in any event until the youngest grandchild reaches the age of thirty years.

"EIGHTH.

"It is my will that all my just debts be paid with as little delay as possible at this time. My debts are very few if any. It is also my desire that my funeral be as quiet and unostentatious as possible.

"And lastly, setting forth the reasons which have governed me in the disposition of my estate, a matter which has given me great concern, my son Frank Rice has never manifested a disposition or capacity either to earn money or take care of it. I therefore feel a bequest to him outright would not be for his best interest, and in the case of my only other child, *May R. Cowie,* well beloved by me, she is now the wife of a man who has always had a seemingly hypnotic control over her will, many times to her absolute detriment, and so far as I have observed after an acquaintance of many years, he has never been able to give her a home or a decent living, and I have advanced large sums of money to pay debts and enable him to live, furnishing her a home, and she now has a life lease of the home she occupies, besides I have been put to great expense and trouble through the actions of her husband, and I here declare that I do not owe either my daughter or her husband, F. G. Cowie, any money for any purpose whatever, and I further declare that I have been acquainted with *Geo. W. Strohmeyer* and *Libbie Allerdice,* my said trustees, for over thirty years. They are well acquainted with my business, and I have the utmost confidence in their ability and integrity."

January 5, 1906, by a codicil No. 1, he made the following changes in articles Four and Seven of the will:

"It is my will that the annual allowance of one hundred dollars to *Beebe Cowie* be increased to a sum sufficient to enable him to complete his education, said sum to be determined by my said trustees, but not to exceed four hundred dollars annually, and at the termination of this trust he is to share equally in the residue of the estate with the children of my

son Frank Rice, and in case of the death of any of said children he is to receive the share of said deceased child. *Beebe Cowie* is also to have such books from my library as he may select at termination of trust, and in case of the death of my son Frank Rice he is to have all the books in my library. I also give him my watch which I have carried for fifty years. It is also my will that my granddaughter *Pussie Cowie* have the piano, to be given her at my death."

On the 30th day of June, 1906, by codicil No. 2 he made a further change, which, so far as need be shown now, is indicated by the following:

"1st. It is my intention that all annuities provided for in my will shall terminate when the trust shall terminate and the estate is to be distributed by the trustees unless a shorter period is specifically named.

"2nd. The interlineations in the seventh and ninth lines of codicil No. 1, which are very material, were inserted before said codicil was executed by me.

"3rd. It is my intent and will, that in determining the period when the trust shall terminate, that the age of any grandchild, whether a child of my son or of my daughter for whom some provision is made in my will, or in the codicils thereto, shall be taken into consideration, and the trust shall terminate when the youngest of said grandchildren shall have attained the age of thirty years, provided only that if my son Frank shall still be living at that time the trust shall continue to the time of his death as provided in the will as originally drawn.

"4th. I do give and bequeath to my granddaughter, *Pussie Cowie,* daughter of my daughter *May R. Cowie,* a semi-annual allowance of one hundred dollars, to aid in her support and education for the term of five years from the time of my death, when the same shall terminate, and at the expiration of the trust she shall receive the sum of two thousand dollars.

"5th. I do hereby re-affirm and re-execute my foregoing will as originally drawn and codicil No. 1 added thereto as modified and changed by this codicil, and the same together with this codicil construed as a whole shall constitute my last will and testament."

By a codicil No. 3, dated July 15, 1906, this further change was made:

"It is my will that in case my grandson, *Beebe Cowie,* shall die before the termination of the trust period provided for by my foregoing will, the share of my estate which would be coming to him had he survived until the termination of the trust shall go and belong to his brother *Gordon Cowie* and his sister *Pussie Cowie,* share and share alike—and in case either of them shall not be living at the time of the termination of the trust the survivor shall take the whole—the same to be paid at the time of the termination of the trust.

"In case my granddaughter *Pussie Cowie* shall die before the termination of the trust period, then the share of my estate given her by my will—except what is given her by this codicil which is disposed of in the event of her death—shall go and belong to her mother, to be paid her as her heirs or assigns at the time of the termination of the trust."

August 5th thereafter codicil No. 4 was added as follows:

"First. I hereby give, devise, and bequeath unto Hartland Lodge No. 122, Free and Accepted Masons, of the village of Hartland, Wisconsin, the sum of one thousand dollars, to be paid to said legatee at the end of five years from my decease, and sooner if needed by said legatee, said payment to be made by the trustees named in said will, and to be kept by said legatee in a building fund, separate from the general funds of said lodge, and expended only in the erection of a Masonic temple or hall building to be used for Masonic purposes by said Hartland Lodge No. 122, Free and Accepted Masons.

"Second. I hereby ratify and confirm the foregoing will and all the codicils thereto preceding this, in every particular except as the same is modified by the preceding paragraph of this codicil."

In due course the will was presented for probate and the hearing in respect thereto brought on, the infants being represented by their guardians *ad litem,* Connell & Weidner, attorneys appearing for the proposing executrix *Libbie Allerdice,* Nath. Pereles & Sons appearing for the proposing executor *George W. Strohmeyer,* and Ryan, Merton & Newbury for

the adult beneficiaries, *May R. Cowie, Lulu C. Rice,* and *Rhea Frances Rice.*

The adults filed objections to allowance of the purported will. A hearing was had in respect thereto October 23, 1906, very little evidence other than ordinary proof of execution of the will being taken. Some arguments were made, principally by Mr. Ryan, representing the objectors, the whole matter so far as proceedings in court is concerned being concluded and the will admitted to probate in one day. Letters testamentary were seasonably issued, and, December 13th thereafter, the contestants appealed to the circuit court for Waukesha county. Soon thereafter, by agreement, the executors were permitted to proceed with the business of administering the estate pending the appeal, it being understood that the hearing on claims would be postponed till return of the record from the appellate court.

On the appeal, there was no contest nor time spent in court in respect to the matter, except a part of one day, and no suggestion was made to the court that the will was invalid or that there was any evidence producible to support the contest. Practically the whole matter was determined by negotiations out of court, resulting in an agreement by which it was attempted to bind all parties interested, if approval by the court could be secured, changing the disposition of the estate of the testator in substantially all material particulars. The agreement was reduced to writing and formally signed by all adult beneficiaries, by the general guardians, the guardians *ad litem,* executors, and attorneys for them and for the adults. It contained a stipulation as to attorneys and guardians *ad litem* fees aggregating $20,000. The several amounts were left blank when the paper was signed by at least some of the parties. Such amounts were settled upon by such attorneys and guardians *ad litem* without much or any consultation with the parties they represented or with the court. The instrument was in such form that *Mr. Daubner* was required

to sign separately for *May R.* (*Pussie*) *Cowie* and *Lloyd R.* (*Beebe*) *Cowie.* After signing once he refused to complete the matter except upon being paid by the mother of his wards a large amount in addition to that stipulated for in the agreement. He was prevailed upon by the other attorneys to accept from *Mrs. Cowie* a much less sum than the extra he first demanded. He finally obtained $1,000 from *Mrs. Cowie* as a condition of his joining in the agreement so as to make it effective, as the parties supposed. He made some claim that *Mrs. Cowie* was justly indebted to him as an excuse for making the demand for extra pay. The fact remained that he exacted a large amount of money from *Mrs. Cowie* as a condition of performing what was his duty to his wards if that required him to sign the agreement or in any way become a party to it. Such agreement, in fact, as *Mr. Daubner* claimed, was largely the work of himself and Mr. Ryan. Complaint was later made in the county court against *Mr. Daubner* because of his aforesaid conduct, in proceedings instituted to terminate his authority as guardian *ad litem.* Thereupon he resigned and the resignation was accepted, no further proceedings being taken against him. After such resignation was accepted *Mr. Henry Lockney* was appointed guardian *ad litem* for the minors previously represented by *Mr. Daubner.*

The agreement was presented to the circuit court as a basis for concluding the proceedings on appeal and, omitting the execution clause, is as follows:

"Whereas, John A. Rice died in the town of Merton, Waukesha county, Wisconsin, on the 18th day of August, A. D. 1906, testate; and

"Whereas, the said John A. Rice left him surviving no widow, but left the following children and grandchildren as heirs at law and next of kin: *May R. Cowie,* who was the only surviving child of said John A. Rice at the time of his death, and *Lulu C. Rice, Rhea Frances Rice,* and *Magdalena Rice,* grandchildren, they being the children of Frank Rice,

who was the son of John A. Rice, deceased; the said *Lulu C. Rice* and *Rhea Frances Rice* being of full age, the said *Magdalena Grace Rice* being a minor over fourteen (14) years of age; and

"Whereas, the said John A. Rice left a last will and testament wherein *George W. Strohmeyer* and *Libbie Allerdice* are named as the executors of said will, also as trustees of the trust created by the terms of said will; and application for the admission of said will to probate having been made in the manner provided by law, the said executors appearing in person and by their attorneys, Messrs. Nath. Pereles & Sons appearing for *George W. Strohmeyer,* and Messrs. Connell & Weidner appearing for executrix *Libbie Allerdice; May R. Cowie* appearing through her attorneys, Messrs. Ryan, Merton & Newbury; *Henry Lockney, Esq.,* the duly appointed guardian *ad litem,* appearing for *Rhea Frances Rice,* then a minor, now an adult, and *Magdalena Grace Rice,* a minor; *G. Holmes Daubner, Esq.,* the duly appointed guardian *ad litem* for *Lloyd Cowie* and *May R. Cowie,* minors, and special legatees under said will; *Lulu C. Rice,* an adult, appearing by Messrs. Ryan, Merton & Newbury, her attorneys; and

"Whereas, further, *May R. Cowie, Lulu C. Rice, Rhea Frances Rice* appeared by their attorneys, Messrs. Ryan, Merton & Newbury, and filed objections to the admission of said will and the codicils, they being four in number, setting forth the grounds of objection, and hearing having been had before the county court of said Waukesha county, Wisconsin; and the same having come on to be heard on the 23d day of October, A. D. 1906; and the court, after being fully advised in the premises, having admitted said will, together with the four codicils, to probate by order of said county court on the 23d day of October, A. D. 1906; and

"Whereas, *May R. Cowie, Lulu C. Rice,* and *Rhea Frances Rice,* then of age, feeling themselves aggrieved and being parties in interest, filed their appeal from the order of said county court admitting said will and codicils to probate within the time prescribed by law to the circuit court of Waukesha county, in the manner provided by law; and

"Whereas, said appeal came on for trial in the circuit court at the May, 1907, term of said court, and is yet pending be-

fore said court, being adjourned from time to time by the consent of all the parties; and said trial upon said appeal being now set for the 12th day of September, A. D. 1907, or as soon thereafter as same can be heard before said circuit court of Waukesha county; and

"Whereas, it appears that the said *May R. Cowie,* daughter of said John A. Rice, deceased, has filed a claim against the estate of said John A. Rice, deceased, in the sum of twelve thousand five hundred ($12,500) dollars; and

"Whereas, all the parties interested in any way in the said matters, after due consultation and consideration of all the facts, circumstances, and law surrounding the case and applicable thereto; and believing it to be for the best interest of the estate and all parties interested therein; and for the purpose of avoiding further litigation; and for the settlement of the present litigation for the contest over the last will and testament of the said John A. Rice, deceased; and to save what necessarily would be great expense in connection with the litigation that would follow the further prosecution of the contest involved in the appeal pending before said circuit court of Waukesha county, have agreed upon the following settlement of the same, and hereby submit said settlement to the said circuit court of Waukesha county, and ask that the same be approved by said court:

"TERMS OF SETTLEMENT.

"I.

"That the order of the county court of Waukesha county, admitting the last will and testament of John A. Rice, deceased, together with the codicils attached, being four in number, and from which order appeal was taken to said circuit court of Waukesha county, be affirmed;

"II.

"That the estate of John A. Rice, deceased, be distributed by the county court of Waukesha county when the time arrives in the course of settlement of said estate in county court of Waukesha county, for making such order of distribution after the payment of all claims allowed and directed to be paid by the executors against said estate, in the manner provided by law, and the one thousand dollars ($1,000) legacy to Hartland Lodge, Free and Accepted Masons, of village of

Hartland; also, all expenses connected with the probating of said estate and directed to be paid out of said estate, also the expenses including attorneys' fees and guardian *ad litem* fees, as hereinafter stated in connection with the appeal pending in circuit court of Waukesha county, as follows:

"The sum of five thousand dollars to Nath. Pereles & Sons, as attorneys for executor *George W. Strohmeyer,* for services performed in said circuit court in connection with said litigation; the sum of five thousand dollars to Messrs. Connell & Weidner, attorneys for executrix *Libbie Allerdice;* also the sum of twenty-five hundred dollars to *G. Holmes Daubner,* guardian *ad litem* for *Lloyd Cowie* and *May R. Cowie,* minors, interested in said litigation, and also the sum of twenty-five hundred dollars to *Henry Lockney,* guardian *ad litem* for *Magdalena Grace Rice,* a minor interested in said litigation; also the sum of five thousand dollars to Messrs. Ryan, Merton & Newbury, attorneys for *May R. Cowie, Lulu C. Rice,* and *Rhea Frances Rice,* for services performed in connection with the litigation in the circuit court of Waukesha county, and that said amounts aforesaid for expenses and attorneys' fees and guardian *ad litem* fees allowed by the circuit court be paid by the executors out of the *corpus* of the estate of said John A. Rice within ten days from the entry of this order.

"III.

"That the legacy bequeathed by the fourth codicil to the will of said John A. Rice of the sum of $1,000 to the Hartland Lodge 122, Free and Accepted Masons, of the village of Hartland, Wisconsin, be paid to said legatees by the executors of the said will of John A. Rice on or before the final settlement of the account of said executors, to be kept by said legatee in a building fund, separate from the general funds of said lodge, to be expended only in the erection of a Masonic temple or hall building for Hartland Lodge No. 122, Free and Accepted Masons.

"IV.

"That the legacy bequeathed to *May R. Cowie,* referred to as *'Pussie' Cowie* in paragraph 4, codicil No. 2, of $2,000, to be held in trust by the trustees named in the will, or their successors, for *May R. Cowie,* and the income thereon paid to the general guardian of said *May R. Cowie* during her

minority for the use and benefit of said *May R. Cowie* and, after reaching her majority, to herself for her use and benefit until the termination of the trust, and at the termination of the trust the sum of $2,000 shall be paid to said *May R. Cowie,* and in case of her death before the termination of said trust, then to her heirs or assigns, or as she may have directed prior to her death. This provision in behalf of said *May R. Cowie* being in lieu of paragraph 4 of said codicil to the will of said John A. Rice. The said *May R. Cowie,* known as *'Pussie,'* shall have the piano referred to in paragraph 1 of codicil 1 to the last will and testament, also $100 a year for the term of five years from the date of the death of John A. Rice, August 18, 1906, to be paid to her by the guardian of *Lloyd Cowie* during his, *Lloyd Cowie's* minority, and by himself after his majority until the five payments herein provided for are made.

"V.

"That in lieu of the provisions made in the last will and testament of John A. Rice, deceased, in favor of *Lloyd Cowie,* referred to in the will as *'Beebe,'* the said *Lloyd Cowie,* his heirs and assigns, shall take and receive from the estate of his said grandfather, John A. Rice, an undivided one-fourth of all said estate in fee simple for his own use and benefit, both real and personal, after the payment of expenses, legacies, etc., herein provided for, subject to be held in trust, however, by the trustees named in the will, or their successors, for the same time and term as provided in the will. The accumulated interest of said undivided one-fourth on said one-fourth interest in said estate shall be paid, together with the income thereafter accumulating, semi-annually to the general guardian of said *Lloyd Cowie* on the 2d day of January and the 1st day of July, of each year, during the term of said trust, and after said *Lloyd Cowie* attains his majority, then said income is to be paid to him in person. The said *Lloyd Cowie,* however, shall also take all of the books in the library of his deceased grandfather, John A. Rice, as provided in codicil No. 1 of the last will and testament of said John A. Rice, and to have the privilege of taking said books at once. He shall also have the watch referred to in said codicil No. 1, Frank Rice, the son of John A. Rice, having died before the death of said John A. Rice. The said *Lloyd Cowie* shall pay,

however, through his general guardian during his minority and by himself after he attains majority, to *May R. Cowie* the sum of $100 per year for the term of five years, to be paid on the 2d day of January each year, and the further sum of $100 to his brother *Gordon Cowie,* for the term of five years, to be paid on the 2d day of January of each year, through his general guardian during his minority and by himself after he attains his majority.

"VI.

"That *Gordon Cowie,* in lieu of any interest contingent, or otherwise, that he may have under said last will and testament, shall receive from his brother *Lloyd Cowie,* to be paid out of the income that said *Lloyd Cowie* will receive from said estate, $100 a year, to be paid to him annually for five years on the 2d day of January in each year, the first payment to be made January 2, 1908, and said annuity to be paid by the general guardian of said *Lloyd Cowie* during his minority and by himself after he attains his majority, until the sum of $500 has been paid.

"VII.

"That the said *May R. Cowie,* the only living child of said John A. Rice, deceased, shall receive from the executors of the will of said John A. Rice, deceased, within ten days from the date hereof, or as soon thereafter as convenient for the executors to pay it, the sum of five thousand dollars ($5,000) cash, for the purpose of paying her debts and meeting her immediate necessities, and she shall take and receive from the estate of her father, John A. Rice, deceased, an undivided one-fourth of all the real estate and personal property of said estate in fee simple, to have and to hold forever, less the sum of five thousand dollars ($5,000), and also such sum at the final settlement of the estate as she and her attorneys shall agree upon as reasonable and just as attorneys' fees, and which sum, when agreed upon, shall be paid by the executors to her attorneys in her behalf for their services in the county court of Waukesha county, and the remainder of said undivided one-fourth, after deducting such sums as hereinbefore are provided to be paid out of said estate, shall remain in trust for the time and term provided in the will. She, the said *May R. Cowie,* to receive all the income accumulated and to be accumulated upon her said one-fourth interest, to be

paid to her by said trustees semi-annually on the 2d day of January and the 1st day of July of each year during the term of said trust, and afterwards to her or her legal representatives in person. The claim of said *May R. Cowie* for $12,500 to be disallowed by the county court and the judgment to be final.

"VIII.

"That in lieu of the provisions made in the will of said John A. Rice for *Lulu C. Rice, Rhea Frances Rice,* and *Magdalena Grace Rice,* children of Frank Rice, son of John A. Rice, deceased, they shall receive each an undivided one-sixth of said estate in fee simple for their own use and benefit, and they shall receive from the executors of the last will and testament of said John A. Rice, within ten days after the date hereof, or as soon as it is convenient for the executors to pay the same, the sum of $1,000 each, said sum to be deducted from each of their proportionate shares. The $1,000 coming under this provision to *Magdalena Grace Rice,* a minor, shall be paid to her general guardian. *Lulu C. Rice* and *Rhea Frances Rice* shall also receive such sum out of their proportionate shares at the settlement of the estate in the county court and before the said estate shall pass into the hands of trustees, for attorneys' fees, as they and their attorneys shall agree upon, and when the amount is agreed upon, the said executor shall pay their attorneys such amount. The balance of their undivided one-sixth each shall then remain in trust for the time and term provided in the last will and testament of said John A. Rice. They shall each, however, receive from the trustees all of the accumulated income of their shares of said estate and the income which will hereafter accumulate and which shall be paid to the said *Lulu C. Rice* and *Rhea Frances Rice* in person and to *Magdalena Grace Rice* through her general guardian during her minority and to herself after she attains her majority, semi-annually on the 2d day of January and 1st day of July of each year.

"IX.

"That the said county court of Waukesha county shall distribute said estate, when the same is ready for distribution in the due course of law, in accordance with the terms of this agreement of settlement and in accordance with the terms of said last will and testament, together with the four codicils

thereto attached, where the same does not conflict with this agreement, and that the said county court shall allow such compensation to the executors named in said last will and testament as is provided by law, including a reasonable allowance for attorneys' fees and guardian *ad litem* fees for services performed in settlement of said estate."

When such agreement was presented to the court, the appeal was taken up for disposition on an order to show cause obtained by Ryan, Merton & Newbury. Mr. Ryan stated to the court, as reasons for changing Mr. Rice's scheme, that it was complicated and difficult to carry out; that it tied up the estate so it would not vest in any one for a long time and would be useless to some interested; that his firm had labored for a long time to arrange a different disposition of the estate by settlement, consulting with attorneys for the executors, with the guardians *ad litem* and all interested; that executor *Strohmeyer,* with whom the will was entrusted by Mr. Rice, testified that he assured the testator that it would be sustained; but that he had concluded to submit to the court whether the agreed plan, which had been arranged and signed by or on behalf of all parties interested, should not take the place of the testamentary scheme, and that all the parties interested were present, or represented, and asked for approval of the agreement.

Mr. Pereles of the firm of Nath. Pereles & Sons announced that he represented *Mr. Strohmeyer* and *Mr. Connell* represented *Miss Allerdice;* that they had filed an answer merely representing their desire to perform their duty in presenting such evidence to sustain the will as they could produce in case a settlement was entered into and to do their share toward administering the estate; that they had no other interest in the controversy; that he believed the plan agreed upon was equitable; that he was desirous of preventing litigation; that he had something to do in aiding Mr. Rice to prepare the codicils and recommended the change as contem-

plated; that the executor thought he had no right to interfere with any settlement the parties might agree upon among themselves, but desired and expected to be protected by order of the court.

Mr. Cowie, *Mrs. Rice,* the guardian *ad litem,* and the beneficiaries testified to this general effect: Each knew the contents of the agreement, the change from the testator's scheme, and agreed thereto. Such scheme was not satisfactory, particularly to *Mrs. Cowie* and *Mrs. Rice.* No one of either the Cowie family or the Rice family possessed any property. Both families needed the benefits securable from the estate for their maintenance. *Mrs. Cowie* was in debt and needed immediate assistance for herself and family. The same was true of *Mrs. Rice.* The trust, by the terms of the will, would be of such long duration that the grandchildren, particularly on the Rice side, would not be likely to survive it, the period being some fifteen years. All joined in requesting the disposition of the estate under the agreement instead of under the plan devised by Mr. Rice.

The evidence having closed without any reference having been made to the stipulated compensation for fees of attorneys for the executors and guardians *ad litem,* the court remarked, in effect, that no such proof was desired, as the parties and attorneys who knew the facts had agreed upon the matter.

Judgment was rendered in due form, specifically confirming the admission of the will to probate, approving of the stipulated changes in the testator's disposition of his property, passing favorably upon the reasonableness of the agreement as to attorneys and guardians *ad litem* fees, and directing that such approved agreement instead of the will should be the basis for settling and distributing the estate.

In due course, after entry of such judgment, the hearing on claims was taken up in county court, all parties interested being represented as in the circuit court, except *Mr. Lockney,*

who had been substituted, as before indicated, as guardian *ad litem* in place of *Mr. Daubner.*

In respect to subsequent proceedings in county court, after substantially all services had been performed, a written agreement was made by Ryan, Merton & Newbury, attorneys on the one side, and all the beneficiaries on the other, the minors acting by their general guardians, that the former should have the same compensation for services rendered in settling the estate as might be allowed to attorneys representing the executors, payable out of the *corpus* of the property and chargeable to the beneficiaries according to their respective interests.

In county court, subsequent to the judgment, objections to claims filed, proceedings in respect thereto, and the distribution of the estate as agreed upon, were looked after, largely, by attorneys for the beneficiaries and attorneys for the executor and the guardians *ad litem* jointly.

There was one appeal to the circuit court, that being by the husband of *Mrs. Cowie,* who filed a large claim. It was allowed in the circuit court by agreement at somewhat less than fifty per cent. There were other claims, reduced, withdrawn, or disallowed, including one in favor of *Mrs. Cowie* which was dropped in consideration of the provision made for her in the circuit court agreement. Aside from the claim of Mr. Cowie, the amount the estate was found to be indebted, directly, was small.

There were fourteen allowed claims, thirteen of which aggregated $6,745.46, one being Mr. Cowie's of $3,277.08 and one $2,714.83 to the Bank of Manitowoc, leaving $753.55 for the aggregate of eleven claims. The remaining claim, allowed at $48,284.80, was a note owned by the Milwaukee National Bank, of which *Mr. Strohmeyer* was president. It was made by the Ideal Land & Investment Company, a corporation of which Mr. Rice was virtually the owner, and indorsed by him. It was carried by the bank as the note of

the corporation and was collectible as such. It was produced by *Mr. Strohmeyer* as evidencing a debt of Mr. Rice. Formal proof thereof was made by the attorneys for executor *Strohmeyer*. Objection was made by the attorneys for some of the beneficiaries against its allowance upon the ground that it was not a proper charge against the estate, though there was no particular contest. It was finally allowed without opposition by the attorneys for the executors under the mistaken notion that it had been treated between the bank and Mr. Rice as his note, otherwise the evidence tended to show, there would have been a question before the county court whether it was a legitimate claim against the estate, though the evidence also tended to show that, in the ultimate, the estate was not thereby prejudiced as the debt, whether of Mr. Rice or his corporation, would, either directly or indirectly, have come out of the estate.

Executrix *Libbie Allerdice* did not personally perform any service of moment in the settlement of the estate though she was represented by attorneys Connell & Weidner from the beginning to the end. Executor *George W. Strohmeyer* performed substantially all the work which was performed by the executors, he being represented from the beginning by attorneys Nath. Pereles & Sons. *Henry Lockney* as guardian *ad litem* represented all minor heirs, except during the time *Mr. Daubner* represented a part of them, and Ryan, Merton & Newbury represented the adults, *Mrs. May R. Cowie, Lulu C. Rice, Rhea F. Rice, Mrs. Rice,* and *Gordon R. Cowie.*

There were court proceedings in the hearing on claims on some eight days and in the settlement of the executors' account on some two different days. The entire proceedings in the settlement of the estate were not attended with any serious difficulty or any unusual amount of labor, except as it was complicated by the negotiations to secure the substitute disposition of the estate, the success of such negotiations, and the numerous attorneys representing different interests, all of

whom participated in performing labor within the scope of the duty of the executors and their attorneys.

The final order settling the executors' account and assigning the estate was made January 8, 1909. The total estate charged to the executor for principal and accumulations was $187,087.09. The total credits allowed was $106,606.35, leaving a balance of $80,455.74, which included some undistributed income. The result, indicated, was reached after deducting $5,000 advanced to *Mrs. Cowie* out of her share in the *corpus,* $1,000 each advanced to *Lulu C. Rice, Rhea F. Rice,* and *Magdalena Grace Rice,* aggregating in all $8,000, pursuant to the circuit court agreement; $20,000 paid to guardians *ad litem* and attorneys pursuant to such agreement, $9,210.57 distributed as income under such agreement, less $662.80 thereof paid for inheritance taxes and $147.77 allowed for executors' percentage, and $10,040 allowed to attorneys and guardians *ad litem* in county court.

Of the residue, $5,566.35 was claimed, allowed, and distributed as income under the agreement, leaving $74,891.39 net *corpus* to be turned over to the trustee for administration as such by the trustee under the circuit court agreement, $1,000 of which was set aside for the Hartland Lodge and $4,000 for a family monument.

The total for distribution as per terms of the will, according to the statement in the adjusted final account—treating credits for administrative expenses, less deductions made on appeal to the circuit court, and items of allowed claims as proper, and adding interest on income disbursed under the agreement, in excess of interest on payments to beneficiaries as per the terms of the will, is as follows:

Total estate, principal and income	$187,084 09
Interest on depletions of the estate pursuant to changes in the testator's scheme in circuit court, less interest on payments authorized by the will computed from time of payments in each case to the date of adjustment of the final account as near as the same can be determined from the record, was	2,912 50
Total debits	$189,996 59

Paid on allowed claims	$55,030 26	
Allowance for attorneys for executors, services of guardians *ad litem*, and other expense items, including transfer tax	8,462 45	
Allowable credits under will to		
Lloyd (Beebe) Cowie	949 66	
Same to May R. (Pussie) Cowie	514 99	
" " Lulu C. Rice	200 00	
" " Magdalena Grace Rice	257 49	
" " Rhea Frances Rice	257 49	
Total credits		$65,672 34
Balance		$124,324 25

Taking account of the advances made to *Mrs. Cowie* and the *Rice* children under the agreement, aggregating $8,000, to be charged to their share of the *corpus,* the residue of $74,891.39 for administration under the trust, as modified by the agreement, was distributable as follows under such agreement:

Family monument	$4,000 00
Hartland Masonic Lodge	1,000 00
Mrs. May R. Cowie	13,972 86
Lloyd (Beebe) Cowie	18,972 85
Lulu C. Rice	11,648 56
Magdalena Grace Rice	11,648 56
Rhea Frances Rice	11,648 56
May R. (Pussie) Cowie	2,000 00
	$74,891 39

The $124,324.25, according to the record as before indicated, at the date of the final settlement, January 8, 1909, computed according to the will, had the estate been settled and transferred to the trustees as contemplated thereby, would have been represented by the following interests:

Hartland Lodge	$1,000 00
Family monument	4,000 00
Lloyd (Beebe) Cowie	29,831 062
Lulu C. Rice	29,831 062
Magdalena Grace Rice	29,831 062
Rhea Frances Rice	29,831 062
	$124,324 25

The same and the income therefrom to go accordingly, subject to payment of $500 per year to *May R. Cowie,* in case of

her becoming a widow, during the remainder of the trust period, not exceeding $400 per year for the five years subsequent to the decease of Mr. Rice to *Lloyd (Beebe) Cowie,* $100 semi-annually to *May R. (Pussie) Cowie,* during the same period, $200 to *Lulu C. Rice,* $100 per year to *Magdalena Grace Rice,* the same to *Rhea Frances Rice* at the termination of the trust period, $2,000 to *May R. (Pussie) Cowie* at such termination, $2,000 to *May R. Cowie,* in case of her then being a widow, and subject to the right of *Lloyd (Beebe) Cowie* to take in place of any of the *Rice* children not surviving the trust, subject to the right of *Gordon Cowie* and *May R. (Pussie)* to succeed to his rights in case of his not so surviving and with like right of survivorship between them in case of only one being alive at the termination of the trust and their brother *Lloyd* predeceasing.

The estate, as so adjusted in the county court, was by the final order, in due form, assigned to *Henry Lockney* as trustee to be administered according to the substitute trust and such directions as the county court might subsequently make as to principal and income.

From the final order *May R. Cowie,* for herself and as general guardian of *Lloyd (Beebe) Cowie, May R. (Pussie) Cowie,* and *Delia Rice,* as general guardian of *Magdalena Grace Rice, Lulu C. Rice,* and *Rhea F. Rice,* joined in appealing to the circuit court from the whole thereof, except that part accepting the resignation of *George W. Strohmeyer* and *Libbie Allerdice* as trustees and appointing *Henry Lockney* in their place.

Such proceedings were thereafter duly had that the appeal in circuit court was organized as an action therein, with the appellants as plaintiffs, to test the order appealed from as to all matters involved either by the notice of appeal or order of the appellate court. The following were made defendants and duly brought into the litigation: *George W. Strohmeyer,* executor, *Libbie Allerdice,* executrix, *G. Holmes*

Daubner, T. E. Ryan, *Ernst Merton,* and *Charles W. Newbury* as firm of Ryan, Merton & Newbury, *Thomas J. Pereles, Nathan Pereles, Jr.,* and *Emil G. Rahr* as firm of Nath. Pereles & Sons, *Samuel A. Connell* and *Adolph J. Weidner* as firm of Connell & Weidner, *Henry Lockney,* and *Thomas J. Pereles* and *James W. Pereles* as personal representatives of James M. Pereles, deceased.

Issues were framed concerning all matters of difference covered by the findings hereafter referred to and in respect to the proceedings in the will contest. The court excluded all evidence respecting such proceedings, particularly as to the allowance of $20,000 for attorneys and guardians *ad litem* fees for services in the circuit court in the will contest appeal, according to the judgment of such court—upon the theory that such judgment was conclusive in respect to all matters covered by it, though the amounts so allowed were considered on the question of whether those allowed in the county court were excessive.

Evidence, in general, by each of the parties concerned in the settlement of the estate in county court as to services therein was received, and, incidentally, as to what occurred in the will contest in circuit court, though all evidence supposed to impeach the result there, was, on objection, rejected.

The evidence indicated or tended to show that one attorney, or one firm of attorneys, could well have protected the interests of the estate in county court, especially under the oversight of competent guardians *ad litem* acting with full appreciation of their duties; that guardians *ad litem* and attorneys for adult beneficiaries occupied, as to some important matters, double and inconsistent positions; that, as before indicated, instead of guardians *ad litem* and attorneys for adult beneficiaries looking, solely, after the interests they represented by seeing that the executors and their attorneys performed their duties, they interfered, by invitation or permission, and did the work themselves, and aside from the in-

terferences and complications involved in the successful attempt to supersede the testator's will, the settlement of the estate was not attended with any special difficulty; that the excuse for two sets of attorneys for the executors was an impression, on the part of *Miss Allerdice,* that the personal interests of her co-executor were in conflict with his duties to the estate, though the county court was not informed thereof in allowing compensation for two sets of attorneys, nor did the attorneys for *Miss Allerdice* act in any adversary way to *Mr. Strohmeyer* or his attorneys.

On the evidence mentioned and papers returned from county court giving some general idea of the work done in that court, the circuit court reached these conclusions:

Three thousand dollars is a reasonable allowance to the executor for attorneys' services rendered in county court, the same to be equally divided between the two firms performing such services, and each firm should refund $1,000 of the amount received upon the adjudgment in such court. The value of the services to the estate, of Ryan, Merton & Newbury, is equal to that rendered by attorneys for the executors and executrix respectively and under a stipulation made should be so fixed, to wit, $1,500, and, therefore, they should refund $1,000 of the amount received by them on the adjustment in county court. The compensation allowed in county court to *G. Holmes Daubner* as guardian *ad litem* is reasonable. Judgments should go in favor of the executors as follows: Against defendants composing the firm of Ryan, Merton & Newbury for $1,000 and interest from the time same was paid to them by the executors; against the defendants, members of the firm of Nath. Pereles & Sons, for a like amount; against the members of the firm of Connell & Weidner for a like sum, and against *Henry Lockney* for a like sum. The executors should stand charged in their account as having $4,000 yet belonging to the estate with interest thereon from the time they parted therewith under the adjustment in

county court till refunded by them or into their hands by those who receive the overpayment, said executors to account for said $4,000 and interest to the person, or persons, entitled thereto in the final distribution of the John A. Rice estate.

Judgment was rendered accordingly, the amount in each recovery adjudged in favor of the executors being $1,121.50, aggregating $4,486. From such judgment the following appeals were taken to this court:

1. *George W. Strohmeyer,* executor, joining with *Libbie Allerdice,* executrix, the former represented by Miller, Mack & Fairchild, attorneys, and the latter by Connell & Weidner, attorneys;

2. *Samuel A. Connell* and *Adolph J. Weidner* as firm of Connell & Weidner and individually, represented by themselves as attorneys;

3. *Thomas J. Pereles, Nathan Pereles,* and *Emil J. Rahr,* as firm of Nath. Pereles & Sons, by such firm as attorneys;

4. *May R. Cowie, Lulu Rice, Rhea F. Rice, Delia Rice* as general guardian of *Magdalena Grace Rice,* and *May R. Cowie* as general guardian of *Lloyd (Beebe) Cowie,* by C. E. Armin, their attorney;

5. *George D. Puffer,* as executor of the last will and testament of Timothy E. Ryan, deceased, *Ernst Merton* and *C. W. Newbury* as surviving partners of the firm of Ryan, Merton & Newbury, represented by M. A. Jacobson, their attorney.

On behalf of the executrix and executor of the will of John A. Rice there was a brief by *Connell & Weidner,* attorneys for *Libbie Allerdice,* and *Miller, Mack & Fairchild,* attorneys for *George W. Strohmeyer,* and the cause was argued orally by *S. A. Connell* and *Geo. P. Miller.*

C. E. Armin, for the appellants the heirs of John A. Rice.

There was also a brief by *Connell & Weidner,* appellants, *in pro. per.,* and oral argument by *S. A. Connell;* also a brief by *Nath. Pereles & Sons,* appellants, *in pro. per.,* and

Charles S. Carter, of counsel, and oral argument by *Mr. Carter.*

M. A. Jacobson, for the appellants *Ernst Merton* and *Charles W. Newbury* as surviving members of the firm of Ryan, Merton & Newbury, and *George D. Puffer* as executor of the will of Timothy E. Ryan; also for the respondents *Ernst Merton* and *C. W. Newbury.*

G. Holmes Daubner, respondent, *in pro. per.*

The following opinion was filed June 19, 1912:

MARSHALL, J. For the foregoing picture, we venture to say, there is no precedent in the history of judicial distributions of the estates of deceased persons. There was a will,—a model for brevity, conciseness, and clearness, considering the magnitude of the estate and number of persons to be remembered efficiently. It is not claimed, and could not well be, that there was any ambiguity in the instrument from the opening lines to the closing of the fourth codicil. Scrupulous care was exercised to avoid uncertainties and guard against danger of interference with the testamentary scheme upon the ground of incompetency or undue influence. The testator had reason, sufficient in his judgment, for any distinction made between the two branches of his family, for not making much provision for his son or daughter, and for removing his estate so far beyond their control as to insure its reaching the grandchildren in their full maturity. That, in general, he exercised wisdom is demonstrated by the record. In the proceedings to displace the testamentary scheme, incapacity is seen in both families to handle the property, as suggested in the will. *Mrs. Cowie* rather corroborated the testamentary declaration as to her husband by declaring that neither she nor he possessed any property or means whatever and that both were so heavily in debt that they needed immediate relief out of the estate. Here, we may well say in

passing, Mr. Cowie later laid claim to well nigh $7,000 from the estate and, by agreement with the attorneys representing the executors, obtained over $3,000.

The whole history of the case shows that Mr. Rice well understood what property he had, its value, how much he owed, and necessity for disposing of his estate in some such way as he did to prevent its being wasted; that, instead of acting from impulse or mere prejudice, he was moved by deliberate judgment, the will bears evidence and subsequent events vindicate, circumstantially. He evidently realized that discrimination between the two branches of the family and failure to make larger provision for his two children might, unexplained, give rise to dangerous and expensive attempts to disturb his scheme when the time came for executing it; so, he made such explanation on the face of the will. To further guard against it being claimed the will was not his own deliberate act with full appreciation of all moral rights to share in his bounty, a year after it was first executed he added a codicil, putting a favorite grandson,—a child of his daughter *Mrs. Cowie,*—on the same basis as to direct benefits as the children of his son Frank, with such valuable contingent rights as to succeeding to the provision made for the latter's children as to place the two families quite nearly on a par. Frank was then alive and he and the daughter, personally, were treated substantially alike, the dominant idea in the scheme being, from the first, to preserve the estate for the grandchildren. With this material change the will was, inferentially, ratified and re-executed.

After some six months' further deliberation, for greater certainty that his scheme would be understood and executed, particularly the dominant feature that the *corpus* with its accumulations should be held in trust for the benefit of his grandchildren till such time, in all reasonable probability, if ever, as it would reach them without interference from the parents on either side and they would be competent to look

after their interests, he made a second codicil postponing distribution till the death of Frank and the arrival at the age of thirty years of his youngest grandchild on either side, declaring his intention, more specifically, as to the termination of annuities, explaining and affirming some changes made by interlineations in the first codicil, and expressly reaffirming the will as first drawn subject to the changes wrought by the two codicils.

Some two weeks thereafter, the will was a third time, inferentially, reaffirmed by the addition of a third codicil in which further provision was made to preserve that portion of the estate set aside, absolutely or contingently, for the branch of his family represented by his daughter; giving the brother and sister of *Lloyd* (*Beebe*) *Cowie* the right, contingently, to succeed to his right and a right of succession between themselves and right of *Mrs. Cowie* to take as successor of her daughter in respect to previous provisions made for the latter, in case of the daughter dying during the existence of the trust.

About three weeks later, and a short time before his death, Mr. Rice made a fourth and last carefully drawn codicil, making provision, in minute detail, for the Masonic body of which he, presumably, was a member—taking occasion again to expressly reaffirm the will and codicils. He took further precaution to consult with his confidential friend, *Strohmeyer*, respecting his scheme and exact an opinion that it was legitimate and could be carried out.

So it will be seen that the two branches of Mr. Rice's family were treated, from his standpoint, alike, so far as due conservation of the property for the benefit of the grandchildren would permit. The thought was that, in no event, should there be any very considerable distribution of either principal or income during the life of his son Frank, nor till his youngest grandchild should come to the age of thirty years, a period of some seventeen years from the time the will was made. The reasons therefor are so circumstantially ap-

parent that the fact itself casts no suspicion upon the will. If there were any difference in the treatment of his two children, personally, the odds were in favor of *Mrs. Cowie.*

The foregoing history, with other matters to be referred to later, is appropriate, bearing on the question of the legitimate services required, or permissible, in the settlement of Mr. Rice's estate, and the limit of reasonable expense therefor, which is one of the main subjects for consideration on this appeal, and with reference to other matters material to the case.

It seems, from the foregoing and what occurred with reference to the will, that *Mrs. Cowie* was interested in having the will set aside, not so much because she was personally discriminated against as because she thought her three children were not favored equally with the *Rice* children, and, because the estate was put entirely beyond her reach and that of any of her children for a long term of years. To set aside that dominant feature of the scheme, all parties were interested, though not, perhaps, in equal degree, and to accomplish it, all co-operated as the statement of facts shows, including those acting by guardians *ad litem,* executors, and their attorneys as well.

The proceedings to contest the will in the county court appear to have been merely *pro forma.* There was no one pecuniarily interested, particularly, to sustain it as the beneficiaries looked at the matter, because enjoyment of the estate by them was so remote. There was no one whose duty it was to sustain it, if practicable, except the executors, their attorneys, the guardians *ad litem,* and the court. An imperative duty rested there. Just what occurred does not appear; but, it sufficiently does that no showing was made adverse to the will which appeared to the judicial mind at all serious. Probably none other than of a most formal character. Chief reliance seems to have been placed on proving that Mr. Rice was mistaken in thinking his daughter was subject to be un-

duly influenced by her husband. Very little evidence was offered aside from the usual formal proof. There were arguments, principally by Mr. Ryan for the contestants and *Mr. Rahr* for the executors,—whether there were others does not definitely appear; but, the indications are that the whole proceeding was comparatively brief and substantially featureless as regards anything questioning the validity of the will, except for an address by Mr. Ryan. He testified respecting what was done, as also did *Mr. Rahr,* without stating that anything occurred showing serious attempt to impeach the will, except, possibly, the address by Mr. Ryan. He testified to having, in his judgment, "made a fine effort," but must have appreciated that the will could not be defeated by mere oratory, or except upon clear, convincing evidence that it was not really Mr. Rice's testamentary disposition though it was such in form. Evidently there was no such showing as the objections were almost summarily overruled.

Presumably, from the record, had the settlement of the estate proceeded in an orderly and ordinary way after the event last described, it would have been quite a simple matter. Eliminating the claim of *Mrs. Cowie,* which was withdrawn, and the large claim of $45,000, which was really not a personal debt of Mr. Rice's, though, perhaps it might have, in any event, reached his estate, indirectly, there were very few debts considering the size of the estate. The work and difficulties subsequent to the allowance of the will were caused, mainly, by the colluding together to destroy it and substitution in place thereof of a scheme to suit the notions and necessities of the Cowie family and the Rice family, with, seemingly, incidental large benefits to attorneys and guardians *ad litem.*

As regards any will contest on legitimate lines, the proceedings in the circuit court were more featureless than those in county court. They impress one, strongly, with the idea that none of the attorneys or the court thought the testament could be treated as invalid on any evidence which was pro-

ducible. Nothing occurred indicating a serious purpose of really impeaching it in a legal sense. The evidence given was not aimed at any such purpose. The reasons given by the leading spirit in the affair, Mr. Ryan, for displacing the testamentary scheme,—that it was complicated, difficult to carry out, left the property not vested in any one in particular for a long time and so as to render it useless to many interested, and that he had labored hard to arrange a different disposition of the estate,—can hardly be taken seriously from the standpoint of what was really involved in the appeal. There was no difficulty at all about the vesting of title or about carrying out the testamentary plan,—none whatever. The difficulty complained of as to the parties not being able to enjoy the property for a long time, and, possibly, some of them not at all because of their not surviving the trust, was just what the testator contemplated and had a right to have carried out. It is difficult to see how the court could have been influenced by Mr. Ryan's suggestion along that line, or the added one that he had been to a large amount of labor to perfect an agreement between all parties for substitution, in place of the testator's plan, of one agreeable to themselves. Just as valueless for any legitimate purpose in a will contest, was the testimony of *Mrs. Cowie* that she needed a part of the estate for her immediate necessities, and that of *Mrs. Rice* to the same effect, and the testimony of both, under the prompting of attorneys, including those for the executors, that the *Rice* children would not probably survive the trust period and so would not receive any benefit from the estate if the income were tied up according to the testamentary scheme. Those circumstances had nothing to do with the question of whether the purported will of Mr. Rice was his in fact and should be carried out. They rather tended to explain why he made the will as he did. He evidently appreciated, fully, that want of business competency led to the condition testified to. From his experience he could not rea-

sonably expect there would be anything but incompetency in the future respecting financial matters as to the parents of the grandchildren on either side; and, so thought it would be futile to place property with them or under their control with a purpose that it should do permanent benefit. He also, evidently, appreciated that his son's expectation of life was brief and that of the children on the Rice side was likewise short. Those circumstances indicate why the greater provision for the *Rice* children than for the *Cowie* children was supplemented by the right of the latter to supersede the former in case of any thereof dying before the termination of the trust. Such rights of survivorship were evidently thought would be likely to eventually give the Cowie branch half or more of the entire estate.

Thus the reasons suggested for varying the testamentary scheme supported the will instead of furnishing any justification for disturbing it. The other testimony offered on the proposition for judicial approval of the agreed scheme, is as barren as that specifically referred to of any legitimate grounds for impeaching the will, indicating that an impeachment thereof, in the legal sense, was not seriously thought of. The gist of all was that the parties had agreed, with permission of the court, to leave the formal execution and probate undisturbed, but substitute a new scheme having the same effect as if it were incorporated in the will as the work of the testator. So it was devoted to showing that all, including general guardians, guardians *ad litem,* executors, and attorneys for them, understood the agreement and approved of it.

The ingenious scheme for judicial approval of the probate, in form, but displacement of the will in fact and substitution thereof of one arranged by treaty, the circuit court seems to have easily lent judicial approval to—not even requesting production of evidence justifying the division of $20,000, or somewhere around one fifth of the net *corpus* of the estate, between

attorneys and guardians *ad litem* for their work of destruction. The judge remarked, in effect, that such matter was not one of judicial concern, since the parties and their attorneys, who knew all about the facts, had agreed respecting the subject.

There is no reasonable explanation of the attitude of attorneys, court, and others concerned in what was done, except it was thought the parties interested in the estate could, legally, all agreeing, notwithstanding it was largely left to minors, do anything they saw fit therewith, even the appropriation of a large part for the attorneys and guardians *ad litem* for their services in setting aside the testamentary scheme by treaty. Erroneous as it seems to be, in view of elementary principles governing the matter and the decisions of this court, notably *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Sumner v. Newton,* 64 Wis. 210, 25 N. W. 30; *Ruggles v. Tyson,* 104 Wis. 500, 81 N. W. 367; *Frame v. Plumb,* 135 Wis. 24, 114 N. W. 849; *Will of Dardis,* 135 Wis. 457, 115 N. W. 332; *Bussell v. Wright,* 133 Wis. 445, 113 N. W. 644; *Patton v. Patrick,* 123 Wis. 218, 101 N. W. 408,—the idea that the wishes of the testator, the public policy crystallized in the law respecting the inviolability of trusts, particularly those created by will, with clear indications of intent to render the beneficiaries incapable of terminating them, stood at all in the way of the wishes of the *cestuis que trustent,* so long as all agreed to substitute their own will therefor, does not seem to have occurred to parties, attorneys, guardians *ad litem,* executors, or court having to do with the matter.

So the deed was done,—nothing very material being left, as before indicated, of the testator's scheme but the shadow of a probate in county court, affirmed in circuit court. Such probate was solemnly adjudicated by the appellate court to be affirmed while no such thing, in practical effect, occurred. On the contrary, the thing probated was, to all intents and purposes, set aside without any evidence or suggestions to

impeach it, and a scheme neither provided by will nor by written law,—one in clear violation of a testamentary prohibition as plain as words could make it, substituted in its place.

There is no precedent for the proceedings described, so far as we know. We venture to say none exists, nor any principle justifying it. The only explanation of it is probable misconception of the scope of the rule that all the beneficiaries of a trust may, by agreement, the trustees consenting, terminate the trust and the limitation thereof as indicated in the decisions of this court. Nevertheless there is, in form, a solemn judgment of the circuit court substituting the wishes of the Cowie family and Rice family, under the guidance of their attorneys and judicially appointed professional representatives, they participating in the benefits, and it has not been appealed from. There it stands, in form *res adjudicata,* as to the matters referred to therein, and is relied upon as a conclusive bar to any inquiry in regard to the main difficulty complained of on this appeal, regardless of whether, as an original matter, it involves a great wrong or not.

We pause at this point to emphasize the stated displacement of the testamentary scheme, by this brief summary of the most significant differences between it and the one substituted therefor.

The plan that four grandchildren, subject to some small bequests, should take the entire net estate with its accumulations, aggregating within reasonable probabilities $200,000 or more, at the end of the specified trust period, all to be divided equally between such grandchildren, subject to some rights of survivorship, carefully designed to effect a plain and legitimate purpose, was changed into one for a division of the *corpus,*—depleted by about one fifth for expenses of making the substitution and a further large amount in advances to beneficiaries,—at the end of such period, the income in the meantime to be distributed as it might accrue.

Mrs. Cowie, who was not, by the will, given anything, ab-

solutely, and only a small amount, contingently, was by the new scheme made equal with the grandchildren in the depleted *corpus* and income—and more, in that she was advanced on her share $5,000, and the bequest to each of the *Rice* children in such depleted *corpus* was reduced one twelfth to make up her share.

The contingent right, under the will, of *Lloyd Cowie* to succeed to the share of any of the *Rice* children not surviving the trust, was displaced by an obligation binding him to pay $100 per year for five years to each of the other *Cowie* children and an elimination of all contingencies as to his fourth.

The scheme for distributing all property in four shares as personalty, except a small amount, was changed for one distributing the estate, depleted as before stated, in five shares representing individual undivided interests in realty and personalty, subject to the advances aforesaid.

The *corpus* and income which, subject to depletion of the former $5,000 for the Hartland lodge and family monument, should have remained in trust for the four beneficiaries at the termination of the administrative period,—a probable $200,000 or more, at that time,—was reduced to $74,891.39, subject to such $5,000.

The contingent trust for *Mrs. Cowie* was changed to an advance of $5,000 out of the *corpus* of the estate and an interest in the residue sufficient to make one quarter of the whole.

The prospective interests of each of the grandchildren of over $30,000 in *corpus* at the commencement of the trust, in the form of personalty, was displaced by an individual undivided interest in realty and personalty, in trust, of the value of less than $20,000 as to *Lloyd Cowie* and $12,000 as to each of the *Rice* children.

The testator's reasonable expectation of his estate being settled at an expense of around $6,000 was changed by the agreement to over $35,000.

If it were clear that the matters covered by the judgment

in the will contest could not be inquired into collaterally, as the trial court ruled repeatedly, narrowing the scope of the inquiry and the decision accordingly, much less attention would have been devoted to the full history of what occurred. If the judgment were only erroneous, and therefore conclusive till set aside in some direct proceeding to that end, yet from an original standpoint all wrong and indefensible, it would seem, we must confess at first impression, perhaps the less said about it the better. Such an apparent travesty upon the administration of justice, irremediable, spread in detail upon the record, would tend to reflect discredit, not only upon the participants therein but upon the judicial system which would render it possible in the first instance, moreover, render the wrong remediless for mere want of a person to seasonably challenge the status established by the judgment. Is the judgment beyond collateral attack? Did the court rule right in respect to holding that it could not look beyond the formal closing of the will contest? That is by far the most important matter presented now. In briefs on the oral argument, counsel for those interested in justifying the trial court's rulings iterated and reiterated that the matters covered by the judgment were a closed book,—referring to the familiar rule that such a pronouncement, within the scope of the court's power, is, till challenged otherwise than collaterally,—deemed to speak words of truth. Repeatedly, on such argument, an effort was made to turn counsel's attention to the allowance in circuit court of $20,000 to attorneys and guardians *ad litem.* They met it, again and again, by invoking the rule of *res adjudicata* as a shield,—not saying one word in justification of it; but, persistently endeavoring to obtain the benefit of that salutary doctrine embodied in the maxim *"Judicia sunt tanquam juris dicta et pro veritate accipiuntur."*

The judgments of the law speak words of truth, infallible, in theory, *ex necessitate,* and doubtless, as nearly in fact, as human wisdom could well approach that ideal; yet, so far, in

possibility, from it, that were it not for the remedies provided for destroying the vitality of unjust judgments in certain cases, or avoiding jurisdictional error founded in judicial usurpation, "the black menaces" which sometimes hover around and cloud such ideal are such that it would seem possible to obscure it altogether; but, with all, in the words of the literary philosopher, quite well illustrated in this case, judicial instrumentalities are so resourceful, that, it is, in reality, as secure "as a star in the maw of the clouds." True to that, notwithstanding the repetition of effort to cover the wreck wrought in the will contest with the shield of *res adjudicata,* the question as to the division of $20,000 of Dr. Rice's estate between the actors in that transaction would not and will not down. The specter, so to speak, of the murdered will, like Banquo's ghost would not and will not vanish, except temporarily. It appeared here and there though brushed aside now and again. It took a place at the table on the argument, stimulating the only one who had no part in the destruction and no reason for excusing it and whose hands were clean of the stain of it—all to his credit,—to declare in the face of the menace of the overshadowing apparition, "Thou canst not say I did it." It would not down permanently because the rule invoked, and seemingly the only thought of effective defense, had no application to the case.

If the court exceeded its jurisdiction of the subject matter, then the judgment is no protection whatever. It may be ignored altogether. *Peck v. School Dist.* 21 Wis. 516; *Blodgett v. Hitt,* 29 Wis. 169; *Damp v. Dane,* 29 Wis. 419; *Mathie v. McIntosh,* 40 Wis. 120; *O'Malley v. Fricke,* 104 Wis. 280, 80 N. W. 436; *Harrigan v. Gilchrist,* 121 Wis. 127, 228, 99 N. W. 909; *Hughes v. Cuming,* 165 N. Y. 91, 58 N. E. 794; *Cooper v. Reynolds,* 77 U. S. 308. The rule is elementary, that if the matter dealt with by the judgment in this case was entirely outside of the court's jurisdiction, then, as said in the last case cited, the result was not merely erroneous and so,

binding on all parties which the court had jurisdiction of, and their privies, till set aside in some of the ways appointed by law, not including collateral attack, but was a usurpation and, as said in *Damp v. Dane, supra,* the proceedings void in the broadest sense of the term. To satisfy the foregoing, manifestly, the jurisdictional defect would have to go to the fullest extent to preclude the parties to the litigation from attacking the judgment collaterally, since, for the time being, all consented to what was done, so far as they had capacity to consent. It follows that, if what was done was not within the scope of a will contest, yet the parties saw fit to mutually bring it into the litigation and the court had jurisdiction of such subjects, the result cannot be considered entirely outside of its authority and so void.

Jurisdiction of the subject matter is not, necessarily, measured by the scope of the controversy as presented by pleadings. Generally speaking, as said in *Cooper v. Reynolds, supra,* "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this . . . is to be sought for in the general nature of" the court's "powers, or in authority specially conferred." The cause of action within the scope of the court's authority may be as broad as the parties see fit to make it by agreement, subject to refusal to entertain it in an irregular way. So the limitation is to be determined in any particular instance by whether the court has jurisdiction of such subjects, as said in *Harrigan v. Gilchrist,* 121 Wis. 127, 229, 99 N. W. 909, or, as said in *Hughes v. Cuming, supra,* whether it had "power to act upon the general, and, so to speak, the abstract question and to determine and adjudge whether the particular facts presented called for the exercise of the abstract power."

The foregoing leads up to the inquiry of whether the circuit court for Waukesha county had judicial power over such subjects as changing the testamentary disposition of prop-

erty from the plan made by the testator to one agreed upon by all the beneficiaries, especially where they were, in part, minors. Did it have jurisdiction in the broad sense of power over such matters, as indicated in *Harrigan v. Gilchrist, supra, Vaughn v. Walsh,* 122 Wis. 486, 100 N. W. 840, and the like? Was the abstract question itself,—that of whether the will of a testator or that of the beneficiaries thereunder shall be the rule for the administration and disposition of the former's estate, within the scope of the power of a circuit court to decide? It must be conceded that such questions are entirely foreign to the scope of a will contest. If a circuit court has no authority to entertain an equitable action to deal with such a matter, then it has none to permit the parties to turn such contest action into the form, in effect, assumed here when the cause was closed by judgment. It was then no longer a will contest matter in any proper sense; but, an equitable action in which all beneficiaries under Dr. Rice's will were parties, to set it aside and make a new one to suit their own notions and necessities,—not because it was invalid but because they preferred a different way of parceling out his property.

The numerous counsel interested in supporting the circuit court's assumption of authority have failed to cite us to any principle or authority justifying it. Maybe necessity therefor was not appreciated. In general, it seems to have been assumed that there was no absolute want of power involved,—only a question of judicial discretion and perhaps not even that,—but that the sole question was whether an agreement between all parties interested was binding on the court; and, so, evidence was confined, as indicated in the statement or as we shall see, to discover whether the writing submitted embodied the real wishes of the parties.

An illustration of the distinction between jurisdiction of the subject matter in the technical sense, rendering a judicial determination, however erroneous, binding till impeached in

some of the ways provided by law, and a mere assertion or pretense of jurisdiction without any real foundation for it whatever, rendering the judicial determination in respect thereto utterly void, is found in *Melia v. Simmons,* 45 Wis. 334; *Frame v. Thormann,* 102 Wis. 63, 79 N. W. 39; *Wis. T. Co. v. Wis. M. & F. Ins. Co. Bank,* 105 Wis. 464, 81 N. W. 642; *Harrigan v. Gilchrist, supra; Jordan v. C. & N. W. R. Co.* 125 Wis. 581, 104 N. W. 803; *Griffith v. Frazier,* 8 Cranch, 9, 23; *Scott v. McNeal,* 154 U. S. 34, 14 Sup. Ct. 1108; *Cunnius v. Reading School Dist.* 198 U. S. 458, 25 Sup. Ct. 721.

The county court, as indicated in the cited cases, having jurisdiction only of the estates of deceased persons in respect to administering the same, the power does not become active, in any particular instance, till the person over whose estate the authority may be asserted is actually dead. A mere allegation and adjudication in proceedings to that end does not suffice. If, notwithstanding that, it turns out that the person adjudged to be dead is in fact alive, all proceedings in respect to his estate are utterly void. The fact of death, irrespective of any adjudication respecting it, is essential as said, in effect, by MARSHALL, C. J., in *Griffith v. Frazier, supra,* to give judicial competency to deliberate in respect to the matter at all, though if that essential fact exists and the court, in due course, appoints one as administrator not entitled thereto by law, the act is binding until annulled by competent authority. The matter of such appointment is subsidiary to the basic fact going to the power of considering, at all, the matter of granting letters of administration. Thus, if the subject of administering one's estate be deliberated upon without the precedent condition of death existing, it is not, under any circumstances, a matter of judicial cognizance, the court has no jurisdiction of such subject, or, in other words, of the subject matter, within the rule, while if the basic condition exists a mistake as to the proper person to take administra-

tion or even a wrong determination as to the existence of any other subsidiary matter such as the existence of property within the state, as in *Jordan v. C. & N. W. R. Co.,* or the place of domicile, as in *Frame v. Thormann,* is in the field of mere judicial error. Applying that to the case in hand, the next inquiry must be as to whether the circuit court had any right, whatever, to deliberate respecting the proper scheme for a distribution of Dr. Rice's property, even to the extent of approving and giving force to the agreement of all parties entitled, in any event, to share in the estate.

Further discussion of the vital question above suggested might take a wide range; but, after all, it is so plainly governed by principle and the logic of the decisions of this court that it may well be greatly narrowed from its possible scope. The writer would rather court the opportunity for an extended discussion thereof than seek to avoid it, but perhaps the more brief treatment will make the better precedent while it will be ample for the result reached.

The right to make a will is more sacred than the right to make a contract. The latter, as evidenced by the writing, may be judicially reformed or set aside upon equitable ground. The former cannot. *Machem v. Machem,* 28 Ala. 374. The court and parties must take it as they find it and,—if valid, abide by the intent embodied in it so far as that can be discovered. There is no judicial power even to correct a will which extends beyond the field of construction and interpretation. 1 Pom. Eq. Jur. (3d ed.) § 371, note.

Said the eminent Chief Justice Gibson, in *Bash v. Bash,* 9 Pa. St. 260, "Every sane man must be allowed to make his own contract as well as his own will." A court might as well usurp the functions of making wills for the dead as contracts for the living. In *Greenwell v. Greenwell,* 5 Ves. Jr. 194, under most distressing circumstances, a court of equity allowed a slight departure from the terms of the trust, practically, on the theory that, in the changed situation, it was really carrying out the presumed wish of the testator, and,

only then, upon consent of all parties interested, all being treated alike. The Lord Chancellor remarked: "I fear, if I should make a decree, it would be my will, and not the testator's;" but, his scruples were overcome upon the consideration suggested. In harmony therewith, this court, speaking by RYAN, C. J., in *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, said:

"Breaking a will is very much like making one;" imposing upon the testator a rule for distribution of his estate "against his solemn wish in dying." "Every one should have the same power to dispose, by will, after his death, in accordance with his own wishes, of whatever he may leave behind him in his own sole right, as he had in life to dispose of it by contract or gift. And it is as much the duty of courts to uphold and enforce his will after death, as to uphold and enforce his contracts made during life."

The right to make a will is very ancient and considered as incidental to the right to acquire property and so one of the inherent rights guaranteed by the constitution. Its recognition antedates common and civil law. It is as ancient as any sort of civilization. It has been held sacred in all nations and under all conditions. Schouler, Wills (3d ed.) §§ 12–17; 30 Am. & Eng. Ency. of Law (2d ed.) 549.

At the time of the adoption of our fundamental law no right was more firmly entrenched in the policy of this country or significantly a part of the common law, than that to make a will. Therefore it was guaranteed by sec. 1, art. I, of the constitution and was also made fundamental by sec. 13, art. XIV.

This court said in *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627, the common-law conception of the right of persons to control the disposition of their property after death, subject to legislative regulation, is one of those rights referred to in the words of the constitution:

"All men are born equally free and independent, and have certain inherent rights; among these are life, liberty and the

pursuit of happiness; to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." Art. I, sec. 1.

Nowhere, at any time, has that right been given greater dignity than in *Nunnemacher v. State.* Its history was there traced as a birthright from the first born and was established as of undoubted constitutional recognition and beyond any earthly power, except that of the people in an original effort to form a government, to take it away.

In *Will of Dardis,* 135 Wis. 457, 115 N. W. 332, the same logic ruled. In conformity thereto it was pointed out that there was a settled legislative policy in this state requiring the establishment of every valid will, even in case of all the parties interested consenting otherwise. The force to be given to that policy was indicated by reference to sec. 4505, Stats. (1898), making it a crime to conceal or suppress a will, regardless of the attitude of the beneficiaries thereunder. Also secs. 3784, 3785, 3786, and 2296, Stats. (1898), were referred to,—all indicating the high character in which testamentary dispositions of property are to be regarded. Therefrom the conclusion was reached, that regardless of holdings elsewhere, in this state, a will, once validly made and subsisting to the death of the testator, must be taken and judicially enforced according to his intent, if that can be ascertained; that parties cannot be permitted, even though all interested join, by any agreement between themselves or any subterfuge to displace the dying wish of the testator; that in respect thereto the public at large are, under the policy of our law, so far concerned in the establishment of such a will that the proceedings to that end are in the nature of an action *in rem,* the whole body of the people being parties. The real judicial question involved is one of status. In that instance the parties stipulated to facts which, if they existed, would have avoided the will, and agreed upon a method of disposing of the estate in place thereof and the proponent joined in the

scheme. The court, nevertheless, allowed the will. On appeal the decision below was affirmed notwithstanding insistence of all parties that the stipulation was binding on the court to render judgment displacing the testamentary scheme. This court affirmed the judgment, remarking in connection with the declaration that the public is a party to a will contest to such extent that the parties thereto cannot set it aside by stipulation:

"There is also recognized by the courts an interest and right of the testator to have the directions of his will carried into effect, at least upon some subjects. His right is recognized to direct at least the method of management and disposal of his property after his decease, which courts cannot be compelled to disregard to accommodate the wishes of some or even all parties having pecuniary interest in the property."

The whole reasoning is in harmony with the previous holdings of the court that the right to make a will and have it allowed and carried out is a constitutional right, affirmed by statute law, and which courts and parties are powerless to take away; that it subsists after the death of the testator, he being recognized as having, in effect, given the court irrevocable power of attorney to carry out his wishes, but not to violate them. The sole jurisdiction of the court is to take note of the testator's intent, so far as it can be discovered by judicial rules and does not violate the law, and give effect to it.

Cases were cited from other jurisdictions in the *Dardis Case* upholding the right of parties to suppress a will by agreement and substitute some new method of distribution; but, in addition to disapproving of them as plainly unsound, they were held to be utterly out of harmony with the public policy here as found in the written law and out of harmony with the general trend of authorities elsewhere.

A person having exercised his right to make a will, and done so in accordance with statutory regulations, has produced a thing and imposed upon the prospective proponent,

the public, and the court specific duties with reference thereto. The mere beneficiaries are not, in the broad sense, the only parties to it; neither are they and those who would take in the absence of a will the only parties concerned, save creditors. Performance of the duty imposed upon the proper person designated by law to propose the will for probate may be compelled and nonperformance thereof punished. The court, having once gained possession of the *res* for the purpose of determining its admissibility to probate, is, to all intents and purposes, possessed thereof as the subject of an action *in rem.* The thing is provable according to its purport only by the witnesses of the law, and disprovable by establishing, as matter of fact, incapacity to make a will, fraud, undue influence, or something of that sort going to show that it is not in reality what it purports to be. Is the thing the will of the testator? That is the sole question. The facts are not provable by stipulation. The proponents have no right to withdraw the thing from the court's possession and jurisdiction. If all the parties appearing themselves withdraw, the thing itself, the will, must still remain in possession of the court. They are powerless to deal with it otherwise than by proving, in the proper manner, that it is or is not what it purports to be. *Syme v. Broughton,* 85 N. C. 367. There can be no judgment of nonsuit, for there is no one competent to submit thereto and no jurisdiction in that regard. The jurisdiction of the court once being challenged upon the subject,—challenged on behalf of the public in general as well as those specially interested,—the judicial doors being opened in response to the instrumentality appointed by law for that purpose,—the question raised must be decided on the evidence or presumptions of law and fact in respect to the matter. *Young's Will,* 123 N. C. 358, 31 S. E. 626. To decide that, is the court's sole function. *Coalter's Ex'r v. Bryan,* 1 Gratt. (Va.) 18. A contract between those interested not to offer a will to probate but to divide the property by agreement, is

void where there are minors; and, even as to adults, such an agreement is *inter partes* and does not affect the question of whether the will shall be probated as written, or not, or affect the matter as between themselves except in so far as permissible under the doctrine of estoppel. *Finch v. Finch,* 14 Ga. 362.

We might pursue the subject discussed at much greater length but enough has been said to indicate, pretty clearly, the boundaries of the court's jurisdiction in a proceeding for the admission of a will to probate. A moment's thought in respect to the situation, under the law, of property left by a deceased person, will demonstrate the utter impropriety of such a proceeding as a dispersion thereof by agreement. Immediately upon death occurring, in case of intestacy, the personal property devolves upon the court, substantially, as personal representative till one shall have been appointed, and then upon the appointee in trust for a distribution according to law. The title to the real estate immediately vests in the heirs of the deceased subject only to be divested by some proper conveyance or in the administration proceedings. In case of a will, the personalty goes first as in case of intestacy; but, as to the realty, immediately upon the allowance of the will it vests in the person, or persons, intended thereby, subject only to be divested in some manner therein pointed out or some other manner provided by law in the course of executing the will, or by a proper conveyance by the person holding the title. Thus the law disposes of the whole subject. It is not given to the court or parties to make a law to govern the matter,—to devise and execute a scheme divesting some of title upon whom the law has cast it, and vesting it in others, by proving of a will in form but substituting something else in substance. The title to Dr. Rice's real estate vested under the will, or under the law, and could not go otherwise except by force of estoppel which could not apply to minors in any event, unless it was proper for the court to

make the law for the case and do something entirely outside of the scope of a probate contest, or any other of judicial cognizance of which there is any precedent, or for which there are any established supporting principles. It is considered that the whole subject was outside the judicial authority and the judgment violating the terms of the will was *coram non judice.*

So we must conclude, not only that there is a constitutional right to make a will but that such right includes a right of equal dignity to have it carried out. There seems to be no escape from the conclusion.

Now where did the circuit court find jurisdiction to do what was done in this case in view of the foregoing? Its jurisdiction was confined to applying the law within the constitutional grant of power, not making it or breaking it. It derived its authority as to the subject, if it had any, from sec. 8, art. VII, of the constitution, for there is no statute affording any such power. The extent of its power did not go beyond "all matters civil and criminal within this state, not excepted in this constitution, and not hereafter prohibited by law; and appellate jurisdiction from all inferior courts and tribunals." The term "matters civil" refers to controversies in law and equity to redress and prevent wrongs and to enforce and preserve and conserve rights,—not to destroy them,—a jurisdiction after the manner of the common law as recognized when the constitution was adopted, which was never understood to extend to the making or breaking of wills of deceased persons, as indicated by this court in *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103, and other decisions referred to. Mr. Justice Miller, in *Cooper v. Reynolds,* 77 U. S. 308, said: Jurisdiction of the subject matter "is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred," meaning conferred by law, not by mere consent of the parties.

It may be that all regarded the will contest in the nature of a proceeding to establish a trust and were misled by expressions in the books to the effect that parties can, and the court may, permit termination of a trust where all parties interested consent thereto, and so thought that the power extended to permitting, in general, what was done in this case and was competent to permit it in will contest proceedings, or at least that it was nonprejudicial, even if irregular, to do it in such proceedings instead of in an independent equitable action. There are many loose expressions in elementary works, and legal opinions as well, that might, taken by themselves, lead to such idea.

This from *Smith v. Harrington,* 86 Mass. 566, 568, is a striking illustration of that:

"The plaintiffs are the heirs, and the only heirs at law of the testator, and are therefore the only parties interested in the enjoyment, or in the final distribution of that part of his estate which still remains in possession of the executors. And as all of the plaintiffs desire that it shall now be distributed, and as the executors make no objection thereto, if they can lawfully pay over the funds in their hands, and express their willingness that the trust should be at once terminated in this manner, and their belief that this will be for the best interest of all parties concerned, there is no good reason why it should not be immediately done. There is no legal or equitable objection to the granting of the relief prayed for in the bill. For considered collectively the plaintiffs are the real and substantial owners of the property, and it is reasonable and just that it should be disposed of in conformity to the desire and preference in which they all unite."

A study of the case, however, indicates that all the parties were *sui juris* and that the broad doctrine stated was pretty clearly fenced about. Other authorities indicate, clearly, that it does not apply where any of the parties are under disability to act for themselves. *Ruggles v. Tyson,* 104 Wis. 500, 81 N. W. 367; *Matthews v. Thompson,* 186 Mass. 14, 71 N. E.

93; *Eakle v. Ingram,* 142 Cal. 15, 75 Pac. 566; *Culbertson's Appeal,* 76 Pa. St. 145; Beach, Trusts, § 705; 39 Cyc. 99.

But the rule stated is not one of universal application. It has been no more definitely limited than by the decisions of this court. *Sumner v. Newton,* 64 Wis. 210, 25 N. W. 30; *Holmes v. Walter,* 118 Wis. 409, 95 N. W. 380; *Patton v. Patrick,* 123 Wis. 218, 101 N. W. 408; *Bussell v. Wright,* 133 Wis. 445, 113 N. W. 644.

In the first case cited the court expressed grave doubts as to whether a trust created, as in this case, can be terminated at all with or without the consent of the court. It was said that it should not be, in any event, without the greatest care not to defeat the cherished purpose of the testator where it is clearly indicated that such purpose was that it should subsist for a particular period to accomplish a particular object, as here; and that such subsistence should be regarded just as sacred as the establishment of it where any other course would violate the clear intention of the testator. It was there urged, on authority, that no court had power to destroy such a trust even by consent of all parties interested—*Douglas v. Cruger,* 80 N. Y. 15, and other cases, being referred to, also sec. 4030, Stats. (1898), prohibiting the court, in supervising the administration of a testamentary trust, from making any order in violation of the terms of the trust and other sections, evincing the legislative policy. The court adopted that view, so far as necessary for the case, remarking:

"It is clearly manifest from the will of Mrs. Goodal that she intended to pledge all the residue of her estate, after the other trusts created therein were executed, to the support and maintenance of Cyprian and Mary G. Chandler during their respective lives, and to place each of them beyond the reach of want while he or she survived, and while any portion of her estate should remain unexpended. . . . In the vicissitudes of human affairs she may come to want. Should such a misfortune overtake her, the intention of the testatrix was to provide a fund to which she might again resort for her main-

tenance. . . . It would be a most pernicious and dangerous rule to allow testamentary trusts for the support of dependent persons to be absolutely terminated upon the mere consent of the beneficiaries, without regard to their capacity or the circumstances under which such consent was obtained, and without any guaranty against future adverse conditions."

In *Patton v. Patrick, supra,* the court, speaking on the same subject, said:

"The rights of an owner of property to control its use and management during his life and after his death, within certain limitations imposed by law, are among the most sacred, and entitled to the most careful protection at the hands of courts, without scrutiny as to the quality of his reasons in making such choice. Among these rights is that of preserving specific real estate as such within a limited time after his death. He may think that thereby is assured either a more certain or larger income than could be obtained by its sale and the investment of the proceeds, or he may believe that the increase in sale value during that term will be for the best interest of those for whom he desires to provide."

In *Holmes v. Walter, supra,* the power to terminate a testamentary trust was expressly limited to cases where all parties interested are *in esse,* are *sui juris,* all consent, and "the will contains no prohibition, expressed or implied, against terminating the trust."

In *Bussell v. Wright, supra,* the court met the question more decisively, perhaps, than theretofore, holding that, a testamentary trust having been fully executed and there being an expressed or implied prohibition against terminating it till so executed, the court had no authority to disregard it. There, as here, all parties concerned joined in an effort to terminate the trust with the result indicated.

The conclusion is reached that, looking at the matter from any viewpoint, the trial court had no jurisdiction of the subject matter of displacing Mr. Rice's will. The agreement to that end should have been ignored as in the *Dardis Will Case.*

The decree, in form, except the affirmance of the probate in county court, must be regarded as a nullity. All expenditures in the contest which followed incidental to the void agreement were an unjustifiable waste of trust funds. The attorneys, guardians *ad litem,* and others who participated in the depletion, however innocently they may have acted, received the money without right and must be held to account therefor. The subsequent proceedings in county court should have proceeded in accordance with the will and the departure therefrom must be remedied, if practicable, though probably the harm done can never be fully repaired. So far as it can be, it must be, notwithstanding it will, doubtless, cause great hardship to several parties who innocently acted on the advice of attorneys, courts, and court assistants. That cannot be helped. Such a result is possible, though not common in the redressing of wrongs,—though very regrettable, of course, where the transgression involves no bad intent and occurs, largely or wholly, from a purpose, as supposed, to promote a worthy end in a moral sense, yet is so necessary to set things right before the law in the given instance and as an admonition for the future that the court, while trying to temper justice with a high degree of mercy, must be quite blinded to the results and consequences of its decrees. So the claim that the trial court erred in excluding the evidence as to the contest proceedings and in refusing to go behind the judgment, so called, rendered therein, must be sustained.

On the appeal by defendants composing the firm of Nath. Pereles & Sons, the point is made that the court erred in denying their motion for a change of venue. They were proper and necessary parties. In such situation a change of venue is not grantable except upon the application of all upon the same side. All being necessary parties to the main controversy to which the issues as to separate defendants, including Nath. Pereles & Sons, were incidental, making several judgments probable though parts of one general decree cov-

ering the chief controversy, the action could not be split up and part tried in one place and part in another. It was an inseparable controversy with a major issue and several minor ones germane thereto. In such cases, an application for a change of venue by one of several on the same side, or similarly interested, is not within the statute. That is ruled by *Wolcott v. Wolcott,* 32 Wis. 63; *Rupp v. Swineford,* 40 Wis. 28; *Eldred v. Becker,* 60 Wis. 43, 18 N. W. 642; *State ex rel. Rowell v. Dick,* 125 Wis. 51, 103 N. W. 229. All parties who have appeared, and are not merely nominal; but, are, really, interested in the controversy on one side though not necessarily on the same side of the record, constitute one party within the meaning of sec. 2625, Stats. (Supp. 1906: Laws of 1905, ch. 282), and must act in harmony, though the affidavit may be made in their behalf by any one on behalf of the others, the motion being in behalf of all.

Complaint is made on behalf of appellants representing the late firm of Ryan, Merton & Newbury because they were brought in as defendants. That is on the mistaken notion that the agreement displacing Mr. Rice's will was legitimate, all proceedings thereon valid, and the only matters concerning such defendants which happened in county court subsequent to the circuit court judgment, were legitimate matters of agreement with the parties they represented, who were competent to contract and did so, and that nothing was involved in the controversy on the appeal impeaching such contract.

As we have seen, Ryan, Merton & Newbury wrongfully obtained, in the circuit court proceedings or pursuant thereto, a large amount of the trust fund. That was a matter which came before the county court and was involved in the order settling the final account. The question was also involved of whether the county court properly recognized them, in any event, as having any claim for services in such court, chargeable to the estate, even if the beneficiaries they represented, or all of them, had competency to contract with reference to the

matter,—especially whether they had any claim under the contract with the beneficiaries as to the county court proceedings. So it is plain the entire subject covered by the appeal from the final order required their presence in the circuit court action in order to settle the entire controversy.

Error is assigned, generally, by appellants on the side of those seeking to sustain the final settlement in county court, because the circuit court overruled objections to the appeal from county court being entertained as to the attorneys' fees because it was taken after the time therefor had expired. That is predicated upon the fact, as claimed, that such court took up the matter of such fees December 24, 1908, made a verbal order regarding the same and minuted it on the court record, though the formal order allowing disbursement of fees so allowed as executors' expenses of administration was not made except as part of the general judgment of January 9, 1906, settling the final account and assigning the residue of the estate; and so, the time for appealing as to attorneys' fees commenced to run from the earlier date and had expired before taken. The idea is that as to such fees, the proceedings at such date were personal to the attorneys and the result a final order, in every respect, as to them and, in legal effect, as to the executors, even though regarded as advisory as to them, since they acted on the faith thereof in promptly paying the amounts allowed to the several parties and on the assurance that there would be no appeal; moreover, that no objection was made to the order itself prior to the payment; but, complaint was confined to the payments being made out of the income instead of out of the *corpus*.

It seems, from the record, that the facts are about as suggested,—that the chief complaint, at first, was that the income was, largely, temporarily depleted to pay the $10,040. The indications are that the matter of attorneys' fees was, in the main, a subject of agreement on the theory that the attorneys and guardians *ad litem* represented equal interests,

four in number—Ryan, Merton & Newbury for the adult beneficiaries and general guardians with whom they had a contract to the effect that they should be allowed out of the *corpus* of the estate an amount equal to that allowed to the attorneys for the executors respectively, *Henry Lockney,* guardian *ad litem* for the minors, Connell & Weidner, attorneys for executrix *Libbie Allerdice,* and Nath. Pereles & Sons for executor *Strohmeyer.*

The executors seem to have treated the matter as one of contract between the attorneys themselves, the beneficiaries, and guardians *ad litem,* subject to judicial approval, and so paid very little, if any, attention to the matter,—supposing that whatever the parties and attorneys agreed to, and the court approved, was good enough for them.

Thus the fixing of attorneys' fees in county court was treated as really part of the general scheme formulated in circuit court to work out the whole matter by treaty as regards division of the estate between the beneficiaries—the attorneys and guardians *ad litem* taking orders from the county court, from time to time, in approval of matters agreed upon and settling such matters as might require such interference for want of harmony. In that there was such dereliction of duty on the part of the executors and the guardians *ad litem* and such approach, at least, to jurisdictional error on the part of the county court in following the void agreement for the disposition of the estate, that the proceedings of December 24, 1908, took very much the cast of that in circuit court. It was really based thereon. If the latter had not occurred the former would not. The beneficiaries had no right to make the county court contract, in any event, especially the general guardians had no authority to join therein nor the guardians *ad litem* to submit thereto. Such contract, doubtless, had something to do with fixing the fees as to the other three interests. The fact that it was made and the entire proceeding had on the theory that the circuit court contract was the

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charter to go by,—a clear mistake of law rather than one of fact under which no real rights were obtained, or obtainable,—is a complete answer to the contention that the time for inquiring into the legitimacy of the order of December 24, 1908, expired in sixty days thereafter on grounds of estoppel. Had the fees of the attorneys been adjusted in due proceedings in the administration of the estate under the will, instead of in direct violation of it, and paid under legitimate circumstances otherwise, a different question would be presented. The case then would have some semblance to *Carpenter v. United States F. & G. Co.* 123 Wis. 209, 215, 101 N. W. 404; *Vaughn v. Walsh,* 122 Wis. 486, 100 N. W. 840; *Schinz v. Schinz,* 90 Wis. 236, 247, 248, 63 N. W. 162; and other cases cited to our attention.

True, it is the law that if an executor or administrator presents a matter to the supervising court for an advisory order, or presents a matter for adjudication proper to be so presented, and parties interested have due notice and opportunity to be heard, time for appealing commences to run from the time the result is announced, whether embodied in a formal order or merely minuted on the court record; and, unless challenged seasonably for correction in the same court or on appeal, it is conclusive. Such is the doctrine of *Schinz v. Schinz, supra,* and we affirm it. As a rule, all ordinary judicial advisory directions, within the range of reason, in the business matters of administering a trust, made upon a presentation of the facts with due care, though without notice to the parties interested, and acted upon in good faith, protect all parties concerned, as more fully shown hereafter under another head. *Harrigan v. Gilchrist,* 121 Wis. 127, 384, 385, 99 N. W. 909. The difficulty here is that the direction does not fall within either of the fields suggested. It was made on a request for settlement of a vital feature of the executor's account, but based on a wholly illegitimate situation to which all herein concerned were parties.

As we have before seen, the Ryan, Merton & Newbury contract in county court was of such character and gave such cast to all proceedings of December 24, 1908, theretofore and thereafter, relating to attorneys and guardian *ad litem* fees in county court, that there, really, was no jurisdictional foundation to start the time for appealing till the entry of the order of distribution January 9th thereafter. We cannot consider the occurrence of December 24th as an ordinary one on application for a final judicial word, judicially spoken, regarding disbursements for expenses of the nature involved. Had it been, doubtless time for appealing would immediately have commenced to run. The whole proceeding was so extraordinary that it is difficult to locate the particular matter within any principle. If there is any such definitely applicable thereto, the books, we venture to say, are barren of any illustration of it.

Counsel for the Ryan, Merton & Newbury interest appreciated the difficulty suggested and contended, as we shall hereafter see, that the whole proceeding as to the contract was extra-judicial,—a mere arbitration, if anything. We do not wholly adopt that view, as before indicated. The contract matter was brought into the general consideration as to counsel fees for the estate, resulting as it seems in the suggestion of $10,000, one half to be specially impressed with the character of compensation for the attorneys for the executors, one quarter with that of compensation for the guardian *ad litem*—really an assistant of the attorneys for the executors, and one fourth with that of compensation for the attorneys for the beneficiaries, in practical effect second assistants to the attorneys for the executors.

On the whole, we incline to the idea, as before indicated, that there was no real judicial disposition of the matter of allowing fees till the subject was covered by the final order, and that whatever was said theretofore was either tentative or nonjudicial. Such parceling out of part of the estate to

attorneys for the beneficiaries and guardians *ad litem* in connection with the previous history has quite the cast of being wholly *coram non judice.* The payments on account of the $10,000 were doubtless made on the faith of the probable allowance in the final account rather than of anything which occurred December 24th, or prior thereto.

Coming to the finality of the allowance of the $10,000 in the order of distribution, the matter was within the subject matter of the court's discretion. If that order was a protection to the executors in paying any part of the $10,000 in face of a possible appeal, it was a protection as to all of it, and it was such protection as we shall see, if the executors made the payments in good faith. With the order of the court within its jurisdiction, the advice of counsel at all points besides, and the apparent consent, for the time being, of all, we can hardly see any warrant for holding there was bad faith in this matter. True, there are many circumstances which well might have put the executors on most diligent inquiry respecting the general scheme of dispersion of the estate in violation of the will, the attorneys and guardians *ad litem* participating, and in a way to suggest, somewhat, want of attention to their duties to the trust they were responsible for conserving, and made them hesitate and perhaps refuse to make the payments, or at least to finally comply with the details of the order of distribution, till expiration of the time for appealing, yet we are not inclined to hold, under all the circumstances, that there was any negligence in the matter amounting to bad faith.

The point is made on behalf of appellants *Merton* and *Newbury* that the court erred in changing the compensation fixed for the firm of Ryan, Merton & Newbury because it was really a matter of contract with the beneficiaries; that the county judge merely acted as an arbiter in the matter with authority to award such firm, on account of the respective interests of the heirs in the *corpus* of the estate and chargeable thereto

accordingly, a like sum to that awarded the attorneys for the executors respectively; that his act was not judicial and therefore was entitled to prevail though the amounts awarded the attorneys for the executors were reduced on appeal. It seems counsel contend for a construction of the writing according to the letter which clearly violates its spirit. It did not leave the matter in question to the county judge but to the court. The purpose was to have the members of the firm recognized as having been, all through, attorneys for the legatee active interveners in the administration proceedings,—not merely as independent overseers of the other attorneys, but as instrumentalities to do their work in fact or join with them therein, at the expense of the estate with the understanding that all should, practically, have the same status as if attorneys for the executors. The general trend of matters from the time of the circuit court contract to that in question is in harmony therewith. Ryan, Merton & Newbury, as indicated in the statement of facts, in all things they were concerned in, performed work within the scope of that of attorneys for the executors. They were treated as if entitled to do so. After the work was nearly all done the written contract was made in harmony with the general conduct of matters. That led the county court to suppose such contract should be treated as of judicial cognizance and the circuit court to suppose that the status created by the arrangement at the start was intended to continue to the end, in harmony with the writing. However, since the parties contracted on an entirely false notion of the interest of the beneficiaries and the latter were seemingly dominated largely by persons who had very little personal concern in the matter, the whole being referable to the illegal circuit court agreement, it furnished no basis for fixing any fees in favor of Ryan, Merton & Newbury. Independently of the agreement, the beneficiaries, except as to the minors by their guardians *ad litem,* had no right to be represented by attorneys in the settlement of

the estate at the expense thereof. It was the duty of the attorneys for the executors to perform, in general, all legal services chargeable to the estate, and that of the guardians *ad litem* to see that they did not do the work for them and at the end combine to have several sets of attorneys' fees instead of one allowed, as there were here, practically all referable to the legitimate work of the executors or their legal advisers.

If the conclusion were otherwise as to the Ryan, Merton & Newbury agreement, it is difficult to see why the point made by appellants who challenged the county court's order that such agreement was unenforceable because contrary to public policy and should not have been recognized by either county or circuit court, is not sound. As attorneys for the general guardian and the adults, it was their duty to insist upon the attorneys for the executors and the guardians *ad litem* performing their duty. That was really their whole scope of legitimate employment. If the estate had been administered in the proper way under the will, full performance of such duty would have left very little for them to do as compared with that devolving upon attorneys for the executors. So in contracting in writing the parties must have had in contemplation, as has been indicated, that the work had been substantially joint, in plain violation of law. That seems to be too clear to have escaped the attention of the county judge. It doubtless did attract his attention, but he supposed the illegal agreement in the circuit court was binding and justified the continuance of the scheme embodied in it to the end. Looking at the matter in the proper light, respecting a legitimate handling thereof, it was the duty of Ryan, Merton & Newbury not only to see that the attorneys for the executors performed their duty but to resist allowance of any compensation to them in excess of what was reasonable for what they actually did which was reasonably necessary to be done. Yet they put themselves by the written contract into a position where they were interested in having as large an amount as

possible allowed such attorneys. The greater the expense in that direction the greater the enrichment of themselves. The general result, naturally, was the allowance of a sum in all, divided into the four parts, each about equal to the fair value of the reasonably necessary services in the whole, considering that one competent attorney, or firm of attorneys, was ample therefor. We cannot approve of the written county court contract. It should have been held void on grounds of public policy and the compensation granted the attorneys for the executors held to cover all expense of that nature chargeable to the estate.

The further point is made on the part of the Ryan, Merton & Newbury branch of the case that the circuit court erred in holding that the $5,000 allowed to them by the circuit court agreement covered their services rendered in county court prior to the appeal in the will contest matters. That may be, but if so, the whole subject has been eliminated by condemnation of both the circuit court and county court contracts, as illegal.

The claim is made on behalf of the executors that they acted in good faith in disbursing the trust fund,—doing it always on judicial directions,—and so are entitled to protection against any personal liability, especially on complaint of the parties who consented to the disbursements. The rule invoked is good in its place.

Doubtless if an executor, acting reasonably and in good faith, disburses money pursuant to an order or direction of the court which it had jurisdiction to make, he is protected in so doing, and, so long as he acts reasonably, he is not obliged to anticipate an appeal and for his protection delay proceedings until the time thereof shall have expired. That must be so, otherwise the administration of trusts under judicial supervision would be intolerably impaired. That courts have so ruled, as counsel contend, would be taken for granted. *Vaughn v. Walsh,* 122 Wis. 486, 489, 100 N. W. 840; *Ernst*

v. Freeman's Estate, 129 Mich. 271, 88 N. W. 636; *Fraser's Ex'r v. Page,* 82 Ky. 73; *Estate of Pritchett,* 51 Cal. 568; *Loring v. Steineman,* 1 Met. 204; *Pierce v. Prescott,* 128 Mass. 140; *Shores v. Hooper,* 153 Mass. 228, 232, 26 N. E. 846; *In re Macky's Estate,* 46 Colo. 79, 102 Pac. 1088. Any ordinary order or judgment of the county court, entered without inexcusable fault on the part of the executor, and acted upon by him, reasonably and in good faith, while not interrupted by any stay or appeal, though within the time for appealing, protects him as to all parties against whom, presently, it is binding. The difficulty is to bring the matters in controversy within such rule. It applies to the regular administration of an estate for distribution under the law or under a will. The administration here was, largely, under neither, but in violation of both—an administration of a sort of arbitration agreement, which the parties, attorneys, and guardians *ad litem* entered into without right. It does not apply if there is such want of jurisdiction as to render the proceedings utterly void. In any event it does not apply in case of want of due care either in respect to properly presenting matters to the county court, or appealing from its determination, or paying out money on the faith of it, when he knows or has good reason to believe it may be set aside on appeal.

In *Harris v. Starkey,* 176 Mass. 445, 57 N. E. 698, it was held, on principle, that after distribution of an estate by an executor, acting in good faith and without inexcusable negligence pursuant to a judicial direction within the competency of the court to make under any circumstances, the matter cannot be opened up to enable a person who has been, by mistake or ignorance of the executor and court and without laches on the part of such person, omitted from the order, to the prejudice of the executor; that such person's remedy, aside from obtaining a correction of the order, so far as necessary, is against those who have received the property for contribution to make up his share. Doubtless that states the

general rule. An administrator or executor is a mere judicial instrumentality in the settling of an estate. He has a right, in general, to rely upon the court in disbursing money coming into his hands. He is a mere agent, that is all, and an agent supposed to act with promptness and fidelity under superior authority. The negligence in disbursing money, as executor or administrator, to make him personally liable, must needs be very manifest,—so great to at least amount to bad faith, something like what is called gross negligence—such utter disregard of duty as to amount to constructive intent to wrongly dissipate the funds.

It would be a very hard rule which would excuse a judge for rendering an erroneous or void judgment and hold his mere agent, acting in good faith and without inexcusable negligence, personally liable for acting in reliance upon an order or judicial direction which the court has competency to make under any circumstances—considering that such competency includes power to err to any extent within the broad field of the subjects in respect to which it has the right to deliberate and decide. In *Harris v. Starkey, supra,* we see the distinction drawn between a typical case of want of jurisdiction of the subject matter, as, in case of administration upon the estate of one as dead who is in fact alive, and the situation where the estate, itself, is presently a proper subject for administration though through negligence or ignorance it occurs in a highly improper manner involving judicial errors of a jurisdictional character. The former fits the distribution of the $20,000 in circuit court, as we have seen, since there was no jurisdiction of the subject of making or deciding upon a scheme for distributing the estate of a deceased person independently of the testamentary or statutory way. We do not see any way for the executors to escape personal responsibility as to that, though we confess it is a great hardship upon them, since they acted under professional advisers in whom, under ordinary circumstances, they would have a right to

rely. Moreover, acted on the judicial advice of the circuit judge.

However, on grounds of public policy, it seems, an executor is not protected in distributing the property of the estate he represents by a direction which is wholly void. The twenty-thousand-dollar distribution did not become legalized to any extent because it was allowed as a credit in the county court. The money was disbursed under the circuit court judgment. The former court did not deliberate in regard to it in any respect. The direction of the circuit court was so void of authority as not to form a legitimate basis for action of any sort. It was within the doctrine, void things are as no things. As applied to a judicial direction or adjudication void for want of power, they do not bind any one otherwise than within the rule of estoppel *in pais*. It is well said not to "be attended with any of the consequences of a valid adjudication;" that it neither affects, impairs, nor creates rights; that "As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril." "As to the person against whom it professes to be rendered, it binds him in no degree whatever." 1 Black, Judgments, § 170. We may well note in passing, the fact that the state, to the knowledge of the county judge, insisted upon treating the participants in the division of the $20,000 fund as legatees to the extent of four fifths thereof, and they submitted thereto, paying the inheritance tax in due course, thus inferentially confessing there was no power in the court to award the large sum as legitimate expenses or there was some inexcusable fault somewhere resulting in an improper depletion of the estate.

Coming down to the distinctively county court matters, we find a different situation to some extent. The court there had full jurisdiction of the subject matter of settling the es-

tate. Therefore, every order or direction made therein, however erroneous, so far as acted upon by the executors in good faith, protects them. If by reason of such action parties have received money which it is finally determined they have no right to retain, the remedy must be wholly against them. In such a case, as we have seen, the order or direction may be modified so as to clear the way for remedial action against the receiver of the money, and, in a proper case, the remedy against such party may be pursued incidental to the direct attack upon the order

It is not easy to separate utterly void matters in this case from those which are wrong in fact though right in law as regards efficiently protecting the executors against personal liability in acting thereon in good faith.

So, it is considered that, in so far as the trial court held that the executors were personally liable for the overpayments in county court to attorneys and the guardians *ad litem,* error was committed. Whether the error is one of fact or law does not clearly appear. The indications are that the trial court considered that, if there were overpayments, the executors were liable as matter of course, which was wrong. All distributions approved or directed by the formal order, except the $20,000 and the $8,000 to *Mrs. Cowie* and three of the grandchildren, which are referable to the circuit court judgment, must be regarded as having been, however erroneous, made, pursuant to judicial direction, within the jurisdiction of the county court, and as to the executors made within the protection of the rule before indicated.

The foregoing leaves for consideration the questions raised in the several appeals by the persons who received the $10,000, that the appellants from the final order of the county court are estopped from complaining because of their having participated in all proceedings up to and inclusive of the making of it without objecting to what was done, particularly

because of keeping silent till the money was segregated from the trust fund and became the individual property of the recipients.

We are unable to see any elements of estoppel in the matter for want of indications that the parties receiving the money did so to their prejudice, by reason of the attitude of the beneficiaries, if they should be permitted by a change of position to recover.

However, waiver may be just as efficient to extinguish a right as estoppel, and requires no real prejudice to the person receiving the surrender in case of a change of position, as indicated in *Pabst B. Co. v. Milwaukee,* 126 Wis. 110, 105 N. W. 563. As there said, in effect, the defense of waiver does not require any consideration beneficial to the waivor nor any element of estoppel, but it does require that the waivor shall possess the full capacity to surrender the right claimed to have been surrendered. So we turn to an examination of the record and claim of the parties to see whether such capacity exists in this case or not.

Much is said about the presence of Mr. F. G. Cowie, husband of *Mrs. Cowie,* during the proceedings, he being referred to once particularly and other times in general as if he was permitted to largely manage the matter in which the beneficiaries were interested, particularly on the side of his family. The estate as such and the minors by their general guardians do not appear to have been represented at all, either in making the contract for attorneys' fees with Ryan, Merton & Newbury or in adjusting the attorneys' fees at $2,500 for each of the four interests. Mr. Cowie appears to have been in evidence, even to levying $150 on Ryan, Merton & Newbury and a like sum on *Mr. Lockney* after payment to them of $2,500 each, to ward off an appeal, apparently,—another of the singular circumstances in this case.

Now, Mr. Cowie had no authority to bind the minors directly or through their general guardians. His, apparently,

efficient interference in the matter commenced before the illegal circuit court contract and seems to have subsisted to the end. No estoppel can be predicated as to the minors or any member of the Rice family on anything he said or did. He had no grievance and is not to be recognized in the litigation. As to *Mrs. Cowie,* she had no authority to bind any one but herself and she had very little interest any way,—none giving her any legitimate present personal concern in any of the trust fund. She had no authority to bind the minors and could not estop them by her conduct. They were represented in court by their guardian *ad litem,* who seems to have left his duties largely to the mothers of his wards and their attorneys, or left them entirely unrepresented or misrepresented in respect to the proceedings of December 24, 1908, and that of January 9, 1909. The wards had no present interest in the trust fund any way and neither did the adults. The money was in the executors' hands to hold in trust for a time which might probably reach beyond the lives of most of the beneficiaries. The situation was such that, quite likely, some of them would not survive to participate in the fund. Who would be the final takers no one could tell. The share of all the *Rice* children might ultimately fall to *Lloyd* (*Beebe*) *Cowie.* The youngest child of *Mrs. Cowie* had a contingent right to the whole. So the entirety might ultimately fall to some one who was a minor when the transactions occurred. The doctrine of estoppel, in the absence of bad faith, as well as the doctrine of waiver, does not apply to such persons. *Blackman v. Baumann,* 22 Wis. 611; *Wilkinson v. Filby,* 24 Wis. 441; Bigelow, Estoppel, 605, 609; 2 Herman, Estoppel, § 1107. In the situation stated we are unable to see how any of the participants in the transactions in question can shield themselves behind an estoppel *in pais.* Possibly they might as to *Mrs. Cowie,* but her interest under the will is so remote that such an estoppel would not make any substantial difference in the result. In any event, the doctrine of

estoppel is based on equitable considerations which do not seem to be sufficient at any point to make it effective here. No one concerned in the matter had any share which would enable him to say anything or do anything which would preclude complaining of the result on behalf of the appellants representing the minors, and they include persons, as we have seen, who may ultimately take the whole net estate and accumulations. Under all the circumstances the executors and attorneys and guardians *ad litem* must be considered as having received, with their eyes wide open so to speak.

The points already discussed and determined render others raised by some one or other of the parties immaterial. We will take occasion now to say that every matter suggested by either party has been examined. Such as have not been and not later specifically noted, have been deemed immaterial in view of the decision upon the others. Practically the whole case on the part of those who advocate the order of the county court and complain of the modification thereof in circuit court, except what appertains to the proper allowance to the executors for expenses in county court, including those for their attorneys, and the allowance to guardians *ad litem,* fails largely on account of dependence upon the utterly void circuit court agreement and the incompetency of any one in the subsequent proceedings, as we shall see, to estop the minors from insisting upon the integrity of the trust by will being preserved, so far as practicable, and carried out. On the other hand, the case on the part of those who challenged the county court's final order on appeal to the circuit court and now complain of the result on such appeal, is, in its main features, supported by the condemnation of the circuit court agreement and judgment.

It is clear from what has been decided that the final result must take a wide range here. The appeal from the county court was from the whole order. The court, with all the parties before it and evidence to show clearly the whole situa-

tion as regards the basis upon which the administration of the estate proceeded from the time the appeal was taken from the admission of the will to probate, had jurisdiction of the whole subject covered by the order. The action as organized in circuit court was not limited, necessarily, to the specific issues tendered by pleadings. The parties mainly interested as appellants were wards of the court. The general appeal and issues tendered, under the circumstances, opened up the whole subject of the validity of the scheme which was illegally substituted for that of Mr. Rice. Only upon that being held valid and the judgment, in form, giving judicial effect to it also valid, could the disbursement of $30,000 for attorneys and guardians *ad litem* fees, particularly any of the $20,000 at first paid out on that account, be sustained. Therefore, the circuit court, had it not erred in refusing to go behind such judgment, would have gotten into a field on the evidence received notwithstanding such ruling where findings would have been required in harmony with the conclusion we have reached. The findings excepted to, allowing attorneys and guardians *ad litem* fees, necessarily reach into a field developing the fact that the whole scheme of administration as regards such expenses had its inception in the circuit court agreement and was dominated thereby to the end. The readjustment of such matter leads to the decision that such scheme was wholly void. That leaves the will as if such scheme had never been thought of. The court cannot make any disposition here or direct any below upon the theory that it, or anything done pursuant to it, was valid. So in remanding, the court must necessarily make such directions as will require a restatement of the executor's account in harmony with the testamentary trust, protecting him from personal liability, so far as he is legally or equitably entitled thereto. That the judgment will strike both ways and heavily upon those who were active in bringing the matter to the attention of the court, cannot be helped. It could not well have been expected

that the expenses for attorneys and guardians *ad litem* would be readjusted on lines inconsistent with the substituted scheme for distributing Mr. Rice's estate, without jeopardizing all which was done under it, and quite likely require the court, in vindication of judicial administration, so far as possible, to adjudge a restoration of the testamentary trust to all the dignity which it should have had from the first, so far as that can be done. If *Mrs. Cowie,* who, by aid of her professional and nonprofessional advisers, was largely the cause of the unfortunate situation and temporarily a chief gainer thereby, in pursuing the matter to the circuit court and further here, on behalf of herself and minor child, or children, unwittingly courted the undoing of the whole illegal scheme whereby her father's wishes were displaced, largely to her benefit, and so aided, without intending to, in remedying the mischief so efficiently produced, that can make no difference. She, as general guardian, and *Delia A. Rice* acting in the same capacity, may well have considered the wards to be truly aggrieved by the destruction of their grandfather's will and the illegal dispersion of his estate. If, appreciating their own pecuniary status, they, consciously, made a great sacrifice, particularly *Mrs. Cowie,* in order to restore the status of things under the will, so far as possible, that may well be regarded as quite a redeeming feature of the case and require, if nothing else does, a reinstatement of the status respecting *Mrs. Cowie's* claim as it stood when she surrendered it in consideration of the illegal agreement being made for distribution of her father's estate. In this connection we will say that, it is considered that such claim should be reinstated and appropriate proceedings be directed for affording *Mrs. Cowie* ample opportunity to establish whatever claim she had against her father's estate, which she gave up in signing the circuit court agreement and securing to her full benefit thereof in the final termination of the litigation.

We now reach the question of whether the circuit court

rendered a judgment too favorable to the attorneys, guardians *ad litem,* and the executors, raised on the appeal of those who challenge the county court settlement, and whether too favorable to the latter, raised by the five separate appeals taken by the former, having eliminated that part relating to the services of the firm of Ryan, Merton & Newbury and also that part relating to *Mr. Daubner,* except $40 allowed for his appearance in county court prior to the appeal from the order admitting the will to probate. As we have seen, the circuit court erred in failing to hold that the county court should not have allowed any of the $20,000 distributed pursuant to the circuit court agreement, in failing to hold that none of the things done pursuant to such agreement were compensable, and in holding that the agreement under which the $2,500 was allowed to Ryan, Merton & Newbury was valid, and in justifying burdening the trust funds with their claim. We must also hold that the circuit court erred in allowing *Mr. Daubner* anything for appearance as guardian *ad litem* in the county court in view of his having already possessed himself of $2,500 of the trust under the illegal agreement and misrepresented his wards in respect thereto. He pleaded that he earned his part of the circuit court distribution because he substantially saved his wards from surrendering anything, and obtained material present benefits for them, particularly *Lloyd (Beebe) Cowie,* in place of the entire enjoyment being postponed for a long term of years, and that he demanded the concession from *Mrs. Cowie* as a condition of signing the agreement because she owed him. He misconceived his duty as guardian *ad litem.* That was to protect his wards' interest in the testamentary scheme if it was valid, not endeavor to obtain the same or a greater interest by destroying it. Mr. Rice, evidently, arranged the matter as to such wards as he thought was for their best interests, in the long run, and in any event, just as he wanted to. It was one of the duties of *Mr. Daubner,* under the circumstances, to de-

fend the testamentary plan. Instead of doing that he was, as he testified, one of the leading spirits in displacing it by a scheme taking but a few days, at most, of nonlegal professional work from any viewpoint, and involving a division of one fifth of the estate between himself and his associates. Moreover the incident of demanding a large amount of money from *Mrs. Cowie* as condition of doing that which he assumed to be his duty to his wards, cannot be overlooked. If it were proper for him to sign the circuit court agreement at all, then it was highly improper for him to demand anything from *Mrs. Cowie* as a condition of doing it, whether she owed money to him or not. So we cannot well escape the conclusion that since *Mr. Daubner* gained his opportunity to participate in the illegal transaction in the circuit court by his brief connection with the estate in the county court, he should not be allowed anything for his appearance in the matter.

What has been said respecting the scope of the guardian *ad litem's* duty and the departure therefrom by *Mr. Daubner,* applies largely to *Mr. Lockney.* It was his duty to vindicate the will, if it was valid, rather than to enter into any scheme to supersede it. He evidently did not appreciate that to enter into the transaction to do the latter and secure $2,500 to himself in the arrangement, participating, in order to do so, in taking $20,000 from the trust fund for division, as was done, was not serving his wards in any proper sense, but such, we are constrained to hold, is the fact. In the subsequent proceedings in county court there was very little for him to do, strictly, as guardian *ad litem.* There was nothing requiring him to take any active part in the hearing on claims or any other matter. The fact that he operated with others under the general arrangement to administer the estate by agreement, and in doing so performed a considerable amount of work which the attorneys for the executors should have done, does not help his case. It must be looked at from the standpoint of what was reasonably necessary or proper for

him to do for his wards. His compensation was not fixed on that basis at all, but on that of his legitimately having done in the settlement of the estate as much as the attorneys for the executors. That came from the fact, that the whole matter was handled by agreement and not with reference to legal duties and responsibilities. Had *Mr. Lockney* merely entered appearance whenever necessary in the proceedings to enable the court to make a binding and orderly termination, stimulated the executors and their attorneys to do their duty, and occupied an advisory or adversary attitude toward them as occasion required, and otherwise remained passive in the administration proceedings, unless there was some reasonable necessity to do otherwise, he would have performed his whole duty. His power was very limited. It did not extend to dealing at all with his wards' property rights. He was in reality an assistant to the court in the administration, with duties of a *quasi*-official character. He should have occupied an adversary position wherever his wards' interests were liable, by any possibility, to be impaired. He could not, properly, have entered into any private bargain for his own benefit at the expense of the trust fund, or stipulated it away, or entered into any agreement, binding on the parties or entitled to recognition by the court, respecting his own compensation or that of others concerned in the matter, or, properly, have remained passive, in respect to a contract known to him to exist whereby others were assuming, or had assumed, to represent his wards in the proceedings at their expense, or employ an attorney, or permit one to be employed, for them without some extraordinary reason and judicial authorization thereof, since adequate professional capacity in the premises is supposed to have been requisite to his own appointment. To stipulate away a ward's property or consent to any judgment or order adverse to his interests is utterly beyond the guardian's jurisdiction. *Will of McNaughton,* 138 Wis. 179, 118 N. W. 997, 120 N. W. 288. In the circumstances of this

case from the viewpoint of an orderly administration by competent executors represented by competent attorneys, there was little for a guardian *ad litem* to do except to stand guard—(to act in a purely advisory capacity as said in *Smith v. Smith,* 69 Ill. 308, approved in the *McNaughton Case*)—and we could not say there was, necessarily, much of that of a really professional character, without casting grave criticism upon the attorneys for the executors.

Now the basis for compensation for services of a guardian *ad litem,* under all ordinary circumstances, is firmly established by numerous adjudications of this court. Such rule is quite general, applying to all *quasi* court assistants. *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250; *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 86 N. W. 243; *Harrigan v. Gilchrist,* 121 Wis. 127, 99 N. W. 909; *Will of McNaughton, supra.*

Notwithstanding what has been repeatedly said here, the nature of a guardian *ad litem's* duties and the standard by which his compensation should be measured were entirely misconceived in this case. The office of guardian *ad litem* is not a place to be sought for, or used, or allowed to be used, as a vocational situation like that of an attorney, in general, much less for taking large sums of money from property belonging to wards for private enrichment. The position is one of trust and confidence toward the ward as well as the court,—to be accepted as matter of duty, to a large extent. Formerly it was considered entirely of that character and the labor performed, done *cum onere* as said in the *McNaughton Case.* The appointment is for the purpose of aiding the court to adequately protect those who are without capacity to protect themselves. The acceptor of an appointment to that trust, should be as careful not to do anything, or allow anything to be done, to the prejudice of his ward's interests, as the court from which he receives his appointment, and not to demand, or expect, compensation except upon the high plane of sound

public policy and professional ethics, indicated in the cases cited.

It is considered that, under all the circumstances of this case, the compensation for *Mr. Lockney* in the county court should be limited to $150, that being reasonable, within the meaning of the statute, for full performance of all the duties which devolved upon him. If he did a large amount of the work which properly belonged to the attorneys for the executors or to the executors themselves, as probably was the case, the compensation due to him as guardian *ad litem* does not properly include it.

On one appeal error is assigned because of failure to make a greater reduction of allowance for legal services rendered the executors in county court, and on appeal by the executors error is assigned because of the reduction made.

The evidence relied upon by counsel for the executors is of little help. It was not directed to such services as would have been required had the estate been administered under the will and one attorney, or firm of attorneys, been employed. As indicated in the statement, except for the unnecessary complications, the estate, considering the size, was a very simple one to settle. There were very few claims, no serious contests, one appeal to the circuit court, and that settled without trial, and only a few days' time spent in actual professional work. The will was allowed after a brief hearing and, eliminating the period of substantial suspense by reason of the appeal, the final order was entered in about a year and four months thereafter. Taking account of the service performed by *Mr. Lockney* at the same rate, the reasonable value of all on account of the estate in county court was testified to be some over $20,000, and in both courts $40,000. Without going over the evidence in detail, suffice it to say, the amounts testified to, in connection with the work actually and necessarily done, are so extravagant as to indicate that the witnesses gave evidence upon false bases not only as to the com-

pensable work done but as to the nature of it and the standard by which it should be measured. Much was really clerical work. Probate work, in general, is simple. In the main the work here did not require any very high degree of legal learning or much of it. Generally speaking, the greater part of such work is done, as it evidently was here, by law clerks and junior partners. Eliminating nonprofessional work, such as should be included in the statutory compensation to the executors, and work caused by the disturbance of the testamentary scheme, such professional work as was reasonably necessary to a proper handling of the estate, considering that one attorney, or firm thereof, was sufficient, would seem to fairly measure by $2,500. There was no excuse for directly employing the two firms of the attorneys for the executors and indirectly two others, taking the guardian *ad litem* as one and Ryan, Merton & Newbury as the other, all of which, apparently, by consent of the attorneys so directly employed.

Such unbusinesslike handling of an estate as the record shows merits the severest condemnation as do the claims for the extravagant amounts for doing such work. As has previously been said, if there is any place where property should be really safe from spoliation, it is when *in custodia legis.* Trusts under immediate judicial control, such as those created by law and by will, should be administered with the highest attainable degree of care, fidelity, and economy. There should be no good reason for a popular idea that when property passes into a trust of that kind, it enters a danger zone involving a high degree of uncertainty as to the outcome to the intended beneficiaries. No waste should be permitted and expenses should be kept down to the lowest practicable point. Administrators, executors, and guardians *ad litem* should strive for distinction in this and courts should stimulate that spirit and firmly check all tendencies to useless expenditure or unbusinesslike handling. This court has several times spoken on that subject and, in the whole, established

a policy which will be firmly adhered to and should be referred to for guidance in trial jurisdiction. Such policy has been so long established that it must be presumed to be familiar.

In fixing the allowance to the executors for attorneys' fees in this instance at $2,500 the court has taken into consideration that executors should execute—perform their duties—not take the pay therefor and largely abdicate performance to others, calling all professional services, with a multiplication of attorneys and assistants, as here. In *Harrigan v. Gilchrist, supra,* two attorneys were employed where one was ample. The work was many times that required in this instance and took many times the amount of the highest obtainable professional work, covered many times the period here, and was performed, as was thought, with considerable distinction. The amount of compensation therefor was fixed at $10,000. Many other examples might be given to emphasize the result. The policy of our unwritten law in respect to the matter, till disturbed by the legislature, will be firmly administered here as occasion may arise therefor,—the rule being made more strict rather than softened, if necessary to prevent recurrences, apparent or real, of improper exploitation of similar trusts. Administrators thereof should excel all others in economical, judicious management and approach to the ideal of full performance of legal, ethical, professional, and official obligations.

The result as to the several appeals is this:

On the appeal of the beneficiaries the judgment must be reversed. As to each of the other appeals, the beneficiaries and respondents as one constitute the prevailing party, except as to that part of the judgment adjudging the executors personally liable for excessive disbursements in county court in compliance with orders of such court.

The general policy of giving such directions, in case of a reversal, as will terminate the litigation unless further pro-

ceedings seem reasonably necessary, will be followed here. The whole history of the subject dealt with appears, probably, as clearly in the record as it can ever be made to appear. The broad superintending control jurisdiction of this court, supplementing its appellate jurisdiction, affords ample competency to give such directions for closing up the controversies in the court below in accordance with this opinion, as will enable such court to readily cover all details of a general decree disposing finally of all complications, as was done in *Harrigan v. Gilchrist, supra.*

Preliminarily, we will say the litigation, appropriately under the circumstances, took the cast below, as in the *Harrigan Case,* of a suit in equity to settle the rights of many parties and they were appropriately arranged on the record according to their adversary status, as near as practicable,—the beneficiaries under the trust as plaintiffs, and those charged with having possessed themselves illegally, or excessively, with portions of the trust fund, or failed to properly account therefor, as defendants. So arranged, the court, taking the whole mass of things into its equity jurisdiction, had ample power to decide all matters raised by the issues tendered, and all others appearing in the litigation by the undisputed evidence, necessary to be decided to protect the minor beneficiaries.

For all those purposes the general appeal from the county court opened up the whole subject covered by the final order as fully as such court might have viewed it, with added power of the higher jurisdiction as to remedial relief. The question as regards the payment of the $20,000 to the attorneys and guardians *ad litem* pursuant to the circuit court agreement, was necessarily involved in the litigation. Solution of it against the propriety of such payment would have been below, as it has been here, fatal to the agreed displacement of the testamentary scheme upon the ground that it was utterly void. That out of the way there would have been no other course to pursue, as there is not now, but to require a restate-

ment of the executors' account and restoration of the testamentary trust to what it was designed to be, so far as practicable.

Probably the income improperly paid to the grandchildren cannot, readily, if at all, be recovered back into the trust, nor the income improperly paid to *Mrs. Cowie,* nor the $8,000 of *corpus* distributed to her and the *Rice* children, or for their benefit under the circuit court agreement. But accounting must be had as to each of the several matters, each particular one being covered, remediably, in the general decree, so, in the aggregate, to remedy the improper handling of the trust fund and restore the integrity of Dr. Rice's scheme for the distribution of his property so far as can be. In making such ending, we must keep prominently in view the plain intent of the testator that the entire property and accumulations, with some small exceptions, should remain in the hands of the trustee till the termination of the trust period. He did not intend there should be any disturbance of that part of his plan under any circumstances, so neither the parties nor the court have any right to do so.

By the Court.—Judgment is ordered as follows:

1. On the appeal of *Mrs. May R. Cowie* and her associates the judgment of the circuit court is reversed.

2. As to each of the four other appeals the appellants will take nothing, except on the appeal by the executors that part of the judgment adjudging them personally liable for excessive amounts paid for expenses of attorneys and guardians *ad litem* in the county court, is reversed.

3. Costs are awarded in this court in favor of appellants *May R. Cowie* and her associates on all appeals.

4. The cause is remanded to the circuit court with the following directions:

(a) To reverse the final order of the county court in so far as it discharged the executors or is inconsistent with the settlement of the estate as directed by this judgment.

(b) To cause an account to be stated as to *Lloyd (Beebe) Cowie, Lulu C. Rice, Rhea Frances Rice,* and *Magdalena G. Rice,* and charging each with income received and any sum advanced out of the *corpus* of the estate pursuant to the circuit court judgment in the will contest appeal, directing $1,000 to be paid to or for the benefit of the *Rice* children, with interest at four and one-half per cent. per annum on each item from the time received to the date of the accounting of the parties and crediting each with any sum which she was entitled to receive in the meantime under the will, except where payment was made by any one interested instead of out of the trust fund, and in that case giving the credit to that one, and giving credit of interest at the aforesaid rate on each item down to the date of closing the account, the balance in each case to be adjudged to be due to the trustee as a part of the trust fund and be carried by him as a debit charge, with interest added at the end of each year on the total of the account till the termination of the trust, and then disposed of according to the rights of the parties as they shall then appear, the decree to contain appropriate direction in respect thereto in accordance herewith.

(c) To cause an account to be had with *Mrs. May R. Cowie* as to all sums received by her from the trust fund with interest at the rate aforesaid on each item from the time received down to the closing of the account; to grant her a hearing, if applied for, within twenty days after the filing of the *remittitur,* on the claim she released in consideration of supposed benefits received under the will contest judgment, such claim to be considered as revived for that purpose as of the time it was so released, any sum found justly due thereon to be credited on the amount of the items charged to her as aforesaid and a recovery for the balance be adjudged in favor of the trustee—the decree to provide that the same, so far as not paid, shall be carried by the trustee in his account as a charge against her till the termination of the trust,

interest to be accumulated as in other cases and she be credited with any sum coming due to her under the terms of the trust, the balance at such termination to then be disposed of in favor of the parties interested in the trust as a part of the trust fund.

(d) On due application therefor to cause an account to be stated as regards the dealing by executors with the trust fund, charging them, as of the date of the final account in county court, with the amount of the debit total estate as then adjusted, to wit, $187,084.09, with interest on the $28,000 disbursed under the circuit court judgment and crediting them with their expenses and disbursements as therein allowed, save and except said $28,000, to wit, $78,626.25, and also with the deduction of $5,566.35 reported as income and subject to disbursement as such, whereby the balance was arrived at of $74,891.39 with such balance, assuming that the same was turned over to the trustee according to the county court's order, and to provide by the decree for a recovery in favor of the trustee of the balance with interest at the rate aforesaid, brought down to the date of closing the account, the judgment not to be enforced as to the amount represented by any judgment for a recovery of any person, or persons, who had the benefit thereof, till all legal remedies shall have been exhausted to recover the same of such person, and in case of payment to the trustee by the executors of the sum represented by such judgment or any balance thereunder, they to be subrogated to the rights of the trustee in respect thereto.

(e) To provide in the decree for recovery in favor of the trustee from *Henry Lockney* of $4,850, less the amount paid by him for inheritance taxes, with interest on the balance at the rate aforesaid from the time the money was received.

(f) To provide in the decree for a recovery in favor of the trustee of the members of the firm of Connell & Weidner of $6,350, less the amount paid by them for inheritance taxes,

with interest on the balance at the rate aforesaid from the time the money was received by them.

(g) To provide in the decree for a recovery of the surviving members of the firm of Ryan, Merton & Newbury, in favor of the trustee, of $7,500, less the amount paid for inheritance tax by such firm, with interest on the balance at the rate aforesaid.

(h) To provide in the decree for a recovery in favor of the trustee of the surviving members of the firm of Nath. Pereles & Sons of $6,350, less the amount paid by said firm for inheritance taxes, with interest on the balance at the rate aforesaid from the time the money was received.

(i) To provide in the decree for a recovery of *G. Holmes Daubner* of $2,540, less the amount of the inheritance taxes paid by him, with interest on the balance at the rate aforesaid from the time the money was received.

(j) To the end that the decree may be perfected, as indicated, to order the trustee brought in as a party plaintiff and such decree be framed and entered with all convenient speed with all appropriate detail conformable to these directions and this opinion.

The prevailing party, *May R. Cowie* and her associates, will be entitled to tax costs for printing the case on their appeal and for printing one brief, divided equally between the several appeals.

A motion was made by the attorney for the prevailing parties for a modification of the mandate so as to permit the custodian of the trust property to pay such attorney such reasonable compensation for his services in conserving the interests of the *cestuis que trustent* as, to the court, might seem just, and for such further order as to the court might seem just and proper. The motion was supported by affidavit of the attorney to the effect, that the F. G. Cowie mentioned in the decision, pretending to hold written authority from the

beneficiaries, employed such attorney to commence the proceedings to recover into the estate the moneys which had been wrongfully diverted therefrom, on a contingent fee of twenty-five per cent.; that pursuant thereto he rendered the services which resulted in restoration of the trust fund, as indicated in the opinion on file, and that in the situation of the case there is no one authorized to pay for such services out of the trust fund, except upon judicial direction, and that in no other way can he obtain compensation for his valuable services than by burdening such fund therewith.

On the hearing, it was disclosed that F. G. Cowie, after all the transactions had occurred which led to the appeal to the circuit court, in form, obtained a power of attorney to proceed in his discretion to recover any money which had been paid improperly out of the trust fund, he to have fifty per cent. of the amount recovered; and pursuant thereto that he farmed out the work to the attorney for one half such contingent compensation.

The motion was opposed by affidavit, joining issue with some of the allegations of the affidavit in support of the motion and stating that there are facts existing showing the transactions of said Cowie with the beneficiaries, or some of them, in respect to the matter to have been unauthorized and be unconscionable.

In presenting the motion the specific relief requested was departed from. A copy of the written contract between F. G. Cowie and the attorney was produced, reciting that the former held written authority from the beneficiaries to recover to the estate and the heirs moneys and property supposed to rightfully belong to said estate and said heirs, and which had been wrongfully diverted, and that pursuant thereto, on behalf of himself and the beneficiaries, he employed the attorney to take steps therefor upon a contingent fee of twenty-five per cent. of the gross amount recovered. Upon the case thus made the court was requested to modify

the mandate so as to authorize the trustee to carry out such contract.

In support of the motion there was a brief by *C. E. Armin, in pro. per.*

In opposition thereto there was a brief by *George H. Gabel,* attorney for *Lulu C. Rice, Rhea F. Harbaugh, née Rice,* and *Magdalena G. Rice,* beneficiaries under the will.

The following opinion was filed October 8, 1912:

Marshall, J. Perhaps the less said, in addition to what appears in the opinion respecting the events leading up to presentation of the history of the Rice estate the second time in circuit court, the better. Enough appears in the opinion on file to indicate that the contract whereby F. G. Cowie sought to acquire a large portion of the trust estate and farm out one half of such portion to *Mr. Armin,* forms no legitimate basis for a charge upon the trust fund in favor of the latter. Neither the *cestuis que trustent* nor any one else could properly destroy the trust created by Dr. Rice in that way any more than by the ways previously attempted. Plainly, the contract did not contemplate restoration of the legitimate trust but execution of the illegitimate disposition of the property, only contesting the manner of the execution in county court. It had no greater dignity as to *Armin,* if even that, than the transaction condemned in the opinion.

Notwithstanding the foregoing *Mr. Armin* commenced and conducted the proceedings which, eventually, came to the form of an action to restore the trust created by Dr. Rice and was, in form at least, and in fact, so far as possible, successful. He was not concerned in any of the transactions which made the appeal from county court necessary. He was recognized from the time the appeal was taken till the final termination of the matter in this court as the representative of the beneficiaries to secure such relief as they were entitled to. He became, in the course of events, in effect, the representa-

tive of the trust estate to secure its restoration, the same as if he had been employed by the trustee. He acted as efficiently as if he had received such employment by authorization of the court having jurisdiction of supervising the execution of the trust. The fact that the result of the litigation was much more far-reaching than was expected, even by the attorney, and placed the net property of which Dr. Rice died possessed, less legitimate expenses of administration, under the control of the trustee to hold for a long time as was originally designed, instead of under the control of the beneficiaries under an illegitimate plan of distribution, does not militate against the fact that *Mr. Armin* so challenged the conduct of all parties concerned with handling the estate, as to bring the whole subject to the view of this court and within its jurisdiction to remedy the numerous wrongs which had been committed. Such being the case, that it is within judicial power to burden the trust estate with such sum for counsel fees for the services which were beneficial to the trust, in a pecuniary sense, as is reasonable, under all the circumstances, seems plain.

The situation was such that there, really, was no trustee to act in respect to restoring the trust fund. The executors, the persons named as trustees in the will and the one appointed by the court, were all adverse to such restoration. In that situation any *cestui que trust* was a proper party to move in the matter. The rule is elementary that, the court having jurisdiction of supervising a trust, may provide for payment out of the trust fund for reasonable expenses in protecting the trust. In so doing it does not recognize contracts made by beneficiaries fixing the amount of compensation as binding. They are only good to support the claim that the services rendered were not voluntary; that they were requested by those having such interest as, under the circumstances, to give them a right to act. The person rendering the service must always rely upon a mere equitable right to be compensated out

of the property conserved for such reasonable sum as the court shall deem proper for the services reasonably necessary. The rule is thus stated in 2 Beach on Trusts, § 698 (p. 1599):

"It is the duty of the trustee to exercise proper care of the trust property, and where the occasion arises he must see to it that it has adequate defense and protection. This obligation rests upon him *virtute officii.* Where a trustee refuses or neglects to give the trust property such needful protection, it may be done by the *cestui que trust.*" . . .

To the same effect are 2 Perry, Trusts (4th ed.) § 910; *Dunham v. W. Steele P. & P. Co.* 100 Mich. 75, 58 N. W. 627; *Rogers v. Vaughan,* 31 Ark. 62, 70.

In such a situation as existed in this case, the primary duty of restoring the trust rested with the trustee. The *cestuis que trustent* possessed the right to act in place of the trustee from the nature of the case. The work performed was, in practical effect, for the trustee as well as for the beneficiaries. It was the same, in reality, as if performed under contract with the former. Reasonable attorney's fees for services actually and rightfully rendered, doing that which is reasonably necessary in conserving a trust estate, are allowable to the trustee as expenses, and may be allowed direct to the attorney, chargeable to the trust fund. They are always within the discretion of the court,—not controlled by contract. 2 Perry, Trusts (4th ed.) § 910. The right to compensation where the services, from the necessities of the case, are performed on request of the *cestuis que trustent* is to be considered, with reference to whether they were reasonably necessary, were in fact beneficial to the trust, the amount and nature of the services and extent of the resulting benefits. They are also to be fixed upon the basis of compensation for somewhat similar services in official life, rather than the customary charges as between attorney and client. Such situation should be classed with those dealt with in *Harrigan v.*

Gilchrist, 121 Wis. 127, 436, 99 N. W. 909; *Tyson v. Richardson,* 103 Wis. 397, 79 N. W. 439; *Richardson v. Tyson,* 110 Wis. 572, 86 N. W. 250.

Within the rules mentioned it is proper for this court to fix the amount allowed to *Mr. Armin* for counsel fees in this court and the trial court as well, since the record satisfactorily shows all the facts. Ordinarily, this court will not go further than to fix the compensation for services rendered on the appeal, leaving the court below to deal with the matter of services rendered there, under advisory or prescribed directions as seems best; but, in such extraordinary situations as we have here in this case, the better administration is to cover the entire field and terminate the litigation in all respects. That was done in *Harrigan v. Gilchrist,* 121 Wis. 127, 460, 99 N. W. 909. The reasons which moved the court to take that course then apply quite as forcibly now.

Much of the work by *Mr. Armin* was not directed to the particular result reached. The overshadowing question in the case—that upon which it turned in the main—was not very helpfully treated, if, even, at all except incidentally. Considering only the services directed in some way to the beneficial result reached, having reference to the integrity of the trust as created by Dr. Rice, and the enlightenment afforded this court in its progress to that end; leaving out of view the labor which only incidentally brought to attention here and within this court's jurisdiction that which became, in the end, the dominant subject dealt with—labor which was, primarily, calculated to bring about another result, not in harmony with the trust as created by Dr. Rice, it is considered that seven hundred dollars ($700) will reasonably compensate *Mr. Armin* therefor and for his disbursements in the circuit court and this court, including such services as may be necessary in order to perfect the judgment in the circuit court according to the directions given here.

The mandate is hereby changed so as to direct payment to *Mr. Armin,* accordingly, of said sum of seven hundred dollars ($700) in full for all the services and disbursements mentioned, such payment to be made out of the income of the trust fund; but only after judgment as here directed shall have been duly perfected below.

HAUETER, Respondent, vs. MARTY and another, Appellants.

September 17—October 8, 1912.

Sales: Cheese: Statute regulating: Validity: Evidence: Self-serving memoranda: Trial: Remarks by judge: Instructions to jury: Appeal: Exceptions: Harmless errors.

1. A remark by the trial judge that he deemed valid a statute which defendant claimed to be unconstitutional, was not prejudicial to defendant, where no testimony was ruled out because of the statute but the case was tried and a special verdict framed as if the statute did not exist, and under the verdict, irrespective of the statute, plaintiff was entitled to recover.

[2. Whether sec. 1670*m*, Stats. (Laws of 1911, ch. 381), relating to the manner of weighing and paying for cheese purchased at wholesale, is valid, not determined.]

3. A memorandum relating to a sale, made by the vendee in his own interest but not brought to the knowledge of the vendor at the time, is not substantive evidence of the facts, as against the vendor.

4. Where the fact that a check had been sent to plaintiff and returned by him as insufficient was conceded, the exclusion of the check itself when offered in evidence was not error, the mere form of the check being immaterial.

5. A general exception to the entire charge, much of which is unexceptionable, or an omnibus exception to the refusal to give numerous requested instructions, some of which were plainly inapplicable to the issues, is not available on appeal.

6. An instruction to the effect that as to certain questions in a special verdict the burden of proof was on the affirmative, *i. e.* that

the jury should not answer them in the affirmative unless satisfied by a preponderance of the evidence that they should be so answered, and that as to another question the burden was on the negative and the jury should not answer it in the negative unless satisfied by a preponderance of the evidence that it should be so answered, was not confusing or misleading.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This is an action to recover the purchase price of a quantity of cheese sold by plaintiff to the defendants, and delivered at the village of Ridgeway, Wisconsin, July 3, 1911, on board a refrigerator car furnished by defendants, and transported to Chicago. There was no dispute in the pleadings or on the trial as to the amount of the cheese delivered nor as to the price of the same per pound, but the claims of defendants were (1) that it was agreed that the cheese should be of a quality equal to a sample theretofore exhibited by the plaintiff, and that it was not equal to such sample, but was spoiled and unmarketable on its arrival at Chicago; (2) that the contract was for the delivery of thirty-two cases of two-pound blocks and eighty to eighty-five cases of one-pound blocks, whereas only thirty-two cases of two-pound blocks and fifty-one cases of one-pound blocks were in fact delivered. These alleged facts were pleaded as a counterclaim as well as a defense, and judgment for damages demanded. A jury trial was had and the following special verdict rendered:

"(1) Did the plaintiff deliver into the car at Ridgeway the number of cases of cheese which he had agreed to deliver on that day? *A.* Yes.

"(2) Were the twenty-five cases which the plaintiff offered to deliver on the 19th day of July suitable for delivery before that time? *A.* No.

"(3) If you answer the first question in the affirmative you need not answer this, but if you answer the first question in the negative then answer this: What number of cases of one-

and two-pound block limburger cheese did the plaintiff agree to deliver into the car on July 3d? *A.* ——.

"(4) Did the plaintiff deliver into the car at Ridgeway the number of pounds of cheese which he claims he did, namely, 6,189 pounds of one-pound block limburger and 4,064 pounds of two-pound block limburger? *A.* Yes.

"(5) If you answer question number 4 in the negative, then answer this: What number of pounds of limburger cheese in one- and two-pound blocks did he deliver? *A.* ——.

"(6) Was it agreed between the parties that the cheese which the plaintiff was to deliver into the car on July 3d should be as good in quality and condition as the cases which were sampled at the factory by *Jacob Marty* in the latter part of June? *A.* No.

"(7) Was the cheese which plaintiff delivered into the car at Ridgeway on July 3d in fact substantially as good in quality and condition as the cases which were sampled by *Jacob Marty* at the factory in the latter part of June? *A.* Yes.

"(8) Was there an agreement between the parties that it was not to be determined until the arrival of the cheese in Chicago whether the cheese was as good in quality and condition as the cases sampled at the factory by *Jacob Marty* in the latter part of June? *A.* No.

"(9) Was it agreed between the plaintiff and the defendant *Jacob Marty,* on the 3d day of July, 1911, before the cheese was delivered on board the car, that there should be no deduction from the contract price of the cheese on account of the quality or condition of the cheese or for any other cause? *A.* Yes.

"(10) What was the fair market value at Ridgeway, Wisconsin, on or about July 19, 1911, of one-pound block limburger cheese of quality like that bought by *Jacob Marty* of the plaintiff on July 3, 1911, for ten and one-half cents per pound? *A.* Ten and one-half cents per pound."

Upon this verdict judgment was rendered for the plaintiff for $1,054.90 damages, besides costs, and the defendants appeal.

For the appellants the cause was submitted on the brief of *E. D. McGowan.*

For the respondent there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

WINSLOW, C. J. The case seems to have been fully and fairly tried and the answers of the jury to the questions of the special verdict are all sustained by sufficient evidence. It may be said also that the special verdict satisfactorily covers all of the matters in issue between the parties, hence it will not be necessary to notice further the appellants' claim that certain questions proposed by them should have been made part of the special verdict.

The assignments of error which are deemed necessary to treat will be briefly considered.

1. By ch. 381, Laws of 1911, it is provided, in substance, that all persons buying cheese in quantities of fifty pounds or more in this state shall, unless otherwise agreed by express contract, cause the same to be weighed at the time of delivery to the purchaser or to the common carrier for shipment, and pay for the same at the weight so ascertained, and at the price agreed on at the time, except for such cheese as may be found of inferior quality by a test made at or before the time of delivery.

This law does not seem to have been relied on by the plaintiff, but during a long cross-examination by defendants' counsel the plaintiff was asked whether a certain letter which he had received from *Mr. Marty,* dated July 6th, was not the same letter which he had mentioned as dated July 7th. The witness answered that it was possible that he might have got that letter in the evening, and the court then suggested that the matter had been gone into fully and that the cross-examination was being extended to great length on matters which under the law might not be material. Exception was taken to this remark by defendants, and the trial judge went on to say that if the testimony was offered for the purpose of showing an express contract it would be received, but not otherwise,

because he deemed that under ch. 381 nothing but an express agreement could be shown. No exception was taken to this remark. A number of further questions were asked and answered, but no further rulings made, nor does the statute seem to have been referred to again. So far as we can discover, no testimony was ruled out because of the existence of the statute. The case was tried and the special verdict framed substantially as if the statute did not exist, and under the verdict, irrespective of the statute, the plaintiff is entitled to recover. The statement of the court that he deemed the statute valid was academic rather than practical. It had no perceptible effect either on the testimony or the verdict. Hence we do not reach the question whether there was error in the ruling nor the question whether the statute is unconstitutional.

2. It was a matter of dispute between the parties whether the plaintiff knew that the cheese was being purchased for shipment to the Chicago market, and the defendant attempted to offer in evidence a memorandum made by him in a note book at the time, in which it was stated that the cheese was to be shipped to Chicago. The plaintiff had already testified that, while he saw *Mr. Marty* write something in his pocket-book, he did not know what it was. The utmost that *Mr. Marty* could testify to was, that he made the memorandum of the purchase and that the plaintiff stood beside him "and saw me when I put it down." There is no evidence, therefore, showing that the plaintiff knew what the memorandum contained at the time. It was a mere self-serving memorandum made by the defendant in his own interest and not brought to the knowledge of the plaintiff at the time. Such memorandums do not constitute substantive evidence of the facts as against the other party to the transaction.

A check which the defendants had tendered to the plaintiff, and which the plaintiff had returned because not sufficient in amount, was offered and properly rejected because the fact

that the check was sent and returned was conceded by the plaintiff, and the mere form of the check became immaterial.

3. The trial court instructed the jury as follows on the question of the burden of proof:

"The burden of proof as to questions 1, 4, 6, 7, 8, and 9 is on the affirmative; by that is meant that you should not answer them in the affirmative unless you are satisfied in your mind by a preponderance of the evidence that they should be so answered. The burden of proof as to question number 2 is on the negative; that is, you should not answer it in the negative unless you are satisfied in your own mind by a preponderance of the evidence that it should be so answered."

It is objected that this instruction is confusing and misleading. It seems clear that there is no sufficient exception to this instruction, for at best the exception is only a general one to the entire charge, much of which is unexceptionable; but, conceding that the question is properly raised, we see no error or confusion in the instruction as given.

4. The defendant requested the giving of eighteen instructions, all of which were refused, and error is claimed on this ruling. There are two sufficient answers to this contention: (1) the instructions were general in their nature and had no proper application to the questions of the special verdict, and (2) the exception taken was an omnibus exception to the refusal to give the entire eighteen instructions, many of which were so palpably inapplicable to the questions of the special verdict as to leave no room for a claim that they should have been given. Citation of authorities showing that such an exception is not available seems unnecessary, but a recent case covering the point may properly be referred to. *Flannigan v. Stauss,* 131 Wis. 94, 111 N. W. 216.

By the Court.—Judgment affirmed.

TUNNISON, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

September 17—October 8, 1912.

Railroads: Injury to person walking on track: Contributory negligence.

A deaf mute who, while walking on a railroad track in the nighttime, was struck and injured by an engine coming from behind, which could have been seen while 800 feet away, is *held* upon the evidence to have been guilty of contributory negligence as a matter of law.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was to recover for the alleged negligent injuring of plaintiff. He and a companion, the former being a deaf mute and the latter practically so, while walking westerly on defendant's main track, about 8 o'clock on the 6th day of March, 1912, were struck by an engine from behind, with the result complained of. A verdict was directed for defendant upon the theory that the plaintiff had no license to walk on the track, nor right to do so, and was guilty of contributory negligence. Judgment was rendered accordingly.

These were the facts: The railroad ran easterly and westerly, in the city of Janesville, Wisconsin, crossing Centre avenue on the east and Cherry street on the west, the distance between the two streets being about 1,284 feet. The place was in the outskirts of the city, considerable distance from any depot and outside the railroad yard limits, though there was a switch and sidetrack used for some special purpose. There were cattle-guards and the customary wing fence at both crossings and a notice near the track at Centre avenue and one near the switch track warning people to keep off the track; but no other prohibitory indications. Sec. 1811, Stats. (1898), prohibits a person from walking upon a railroad track

as the plaintiff did. Nevertheless the people customarily used the track in going from either street to the other. The two persons entered thereon easterly of the westerly side of Cherry street, crossing the cattle-guard at that point in doing so. They were on their way to a point beyond Centre avenue in the city of Janesville. It was nighttime; but not so dark, under the conditions existing, but that a train coming from the east could have been seen while some 800 feet away. There was snow on the ground and it was not cloudy. There was no regular headlight on the engine. The one in place when the trip was entered upon was, thereafter, accidentally put out of commission and there was no opportunity before the accident to supply its place, though a lantern was substituted, which did some service, and there were two small lights, one on each side of the front of the engine, called blizzard lights, in the whole, rendering the engine plainly visible to the east of the place of accident for several hundred feet.

The eyesight of both parties was good. The plaintiff's companion could hear slightly; but not dependably, as he must have known. He could not hear at all, as he must have known. There was evidence of looking back, but no satisfactory evidence that there was such looking while the train was passing over the 800 feet east of the point of accident. In the meantime the parties must have traveled some 150 feet. As the train approached and before the engineer saw them, the bell was being rung. They were observed when some 300 feet away and special signals given to warn them. Particular exertion was not used to check or stop the engine, the engineer supposing the parties would make timely movement out of danger. Upon observing they were oblivious of their peril, notwithstanding all the warnings, he did all in his judgment he could to stop his train. The appliances therefor were in order and worked properly; but the distance was not sufficient to enable the engineer to avoid colliding with the travelers. The cowcatcher threw them on opposite sides, in-

juring the plaintiff. He saw the train just before the collision. There was ample opportunity for the plaintiff and his companion to reach their destination without using defendant's track. They chose the dangerous way for convenience or pleasure. They were adults. They were traveling pretty fast because it was cold. The plaintiff's companion had her hand in her muff and he had hold of her arm. They were on their way to visit her aunt.

Harry M. Silber, for the appellant.

For the respondent there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *Thos. S. Nolan,* and oral argument by *Mr. Van Alstine* and *Mr. Nolan.*

Marshall, J. Irrespective of whether, in face of the statute prohibiting persons from walking on railroad tracks, as was done in this case, a person could be a licensee, it seems the plaintiff was guilty of contributory negligence. The facts as they appear in the statement speak for themselves. The rule applicable to such situations has been so often declared and is so familiarly elementary, that it is needless to restate, much less to cite authority in support thereof. It seems best to rest the case with the statement of facts, this brief reference to the legal effect, and the conclusion reached that, it is considered the judgment should be affirmed.

By the Court.—The judgment is affirmed.

KELM, Respondent, vs. WOODBURY, Appellant.

September 17—October 8, 1912.

Trial: Findings: Omission to make: Appeal: Directing judgment: Accord and satisfaction.

Omission of the trial court in this case to make any finding upon the issue as to whether there had been an accord and satisfaction was a failure to comply with sec. 2863, Stats. (1898); but, there being a clear preponderance of the evidence to the effect that the parties had settled all of their differences arising out of the contract in suit, the supreme court, instead of ordering a new trial, directs a judgment dismissing the complaint.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Reversed.*

This is an action to recover the balance due on a contract by which it is alleged the defendant hired the plaintiff to work his farm for one year. The plaintiff claims that the defendant breached the contract, and he seeks to recover the unpaid portion of the wages and the damages resulting from the breach.

The defendant is a resident of Illinois. He owns a farm of 480 acres in the town of Center, Rock county, this state, which the plaintiff had worked for him in 1908 and 1909. In the latter part of March, 1910, the defendant and the plaintiff made a verbal contract, whereby, in consideration of $500 to be paid in monthly instalments, the plaintiff was to work the defendant's farm for the ensuing year. The plaintiff was to have the use of the house on the premises, and a garden, was to have a share in some of the crops, and, in accordance with the practice between the parties during the previous two years, was to have food from the farm for his animals and chickens. He was to secure the assistance of the members of his family in doing the chores on the farm, was to board the defendant free of charge, and was to board any employees of the defendant at $3 per week for each person.

About October 15th the plaintiff, as the result of differences between him and the defendant, moved from the premises, receiving at the time a check for $65 from the defendant.

The defendant upon the trial of this action testified that the children of the plaintiff did not work on the farm according to the contract, that he was compelled to pay the son for whatever work he did, that he was compelled to pay board for himself and a higher rate for his employees than the contract provided, and that the plaintiff just before he removed from the premises was disposing of more than his share of the crops.

It is undisputed that there was trouble between the parties, that the defendant endeavored to discharge the plaintiff from his employ, notified him to vacate the house, and that the defendant engaged another person to take charge of the place.

On October 15th, when the plaintiff had had no wages since the 1st of September, the defendant came to the house with Mr. Pellett and Mr. Reigert, the man he had employed to take charge of the farm, for the purpose of coming to some agreement with the plaintiff so that the new employee might get possession of the house. The plaintiff refused to vacate until the defendant should settle with him. He demanded $200, claiming that he had been employed for a year at $500 and that the defendant had discharged him without cause. The defendant was willing to pay the plaintiff his back wages but nothing more, and claimed that only from $40 to $45 was due the plaintiff and that the contract ran only from month to month. Finally, a check for $65 was written by the defendant and was left to be delivered to the plaintiff when he should leave the premises. A few days later the plaintiff left; the check was given to the plaintiff's wife and was cashed by the plaintiff and his wife. The defendant claims that the check was in full settlement of all differences between him and the plaintiff. Plaintiff claims that it was only a partial payment

and was the amount due him for services up to the time he left the premises. The defendant, Mr. Pellett, and Mr. Reigert, the person who succeeded the plaintiff on the farm, testified that the $65 paid the plaintiff was agreed upon by them as a settlement in full of all the differences between the plaintiff and the defendant. They testified that the plaintiff had at first demanded $200, had reduced his demand to $100 and then to $75, and that upon their suggestion he finally agreed to take $65 in full of all claims against the defendant. The plaintiff testified that it was understood that it was to apply on the wages due him and that it was paid only to induce him to vacate the premises so as to give Mr. Reigert possession of the farm. There was no statement on the check as to whether it was in full or was only a partial payment.

The court found the facts as above set out as to the making of the contract, that the plaintiff was ready and willing to perform all of the conditions of the contract, and that he had duly performed his duties under the contract until October 22, 1910, that the defendant without justification had discharged the plaintiff and caused him to surrender possession and to remove from the premises, and had failed to furnish the plaintiff with food and shelter for his animals and chickens as required by the contract. The court also calculated the amount paid to the plaintiff up to the time he left the premises and the amount still due him under the contract after deducting the amount earned by him after he left the premises and up to the time of termination of the contract, and awarded plaintiff judgment for the amount thus found to be due him, namely, $247.37, with interest from April 1, 1911, and for costs.

This is an appeal from the judgment on the findings in plaintiff's favor.

Arthur M. Fisher, for the appellant.

Thos. S. Nolan, for the respondent.

Siebecker, J. The appellant asserts that the evidence on the question of a settlement by the parties of all matters in controversy clearly establishes that after plaintiff's discharge from defendant's employ such a settlement was made and that the plaintiff accepted $65, the amount agreed upon by the parties, in full payment of the amount due him under such settlement. The plaintiff denies that the settlement was made and claims that at the time of the negotiations for a settlement he claimed and demanded a sum for satisfaction of his damages for defendant's breach of contract far in excess of the $65 he received as avails of the check defendant drew in his favor on that day and which was subsequently delivered to plaintiff's wife, and that the $65 so received was intended to apply as wages due him under their contract and was paid him to then vacate and remove from the farm. This claim of the plaintiff is denied by the defendant, who testifies that he and the plaintiff, in the presence of the witnesses Pellett and Reigert, negotiated on October 15, 1910, at the farm, to settle all matters in controversy between them arising out of the transactions involved in this litigation. It is shown that these four men did meet as stated and that a settlement of the differences between the plaintiff and the defendant was undertaken and discussed by them all. The evidence of the defendant and of the witnesses Pellett and Reigert is clearly to the effect that the plaintiff in the beginning of the negotiations demanded $200 from the defendant to satisfy his demands and that the defendant firmly asserted that he owed him nothing in excess of the balance due plaintiff for services at the contract rate and that this did not exceed $40, that the plaintiff during the negotiations reduced the amount of his demand to $75, that thereupon the witnesses suggested to the parties that they compromise by dividing the difference between the two sums, and that the parties then agreed upon $65 as the amount and then and there assented thereto, and that the defendant drew a check on his bank for this amount, payable to

the plaintiff's order, and left it with the witness Reigert with directions to deliver it to the plaintiff when he vacated and removed from the farm. There is no dispute that the check was delivered to the plaintiff's wife on the day the plaintiff vacated the farm and that the plaintiff thereafter received the proceeds thereof. The record discloses that the issue of a settlement was the principal one litigated upon the trial and that the defendant's counsel submitted a formal finding to the court and requested that the court find as fact that the settlement was made and carried out as the defendant claimed throughout the trial of the case. The court did not adopt this requested finding or its equivalent, but wholly omitted to make a finding on this issue and made findings in the case as though no such issue had been presented and litigated. The findings of the court, the details of which appear in the foregoing statement and upon which the court found in plaintiff's favor, embrace the other issues litigated, and the court awarded plaintiff recovery for the amount of damages found. It is difficult to perceive how this omission could occur, under the circumstances attending the trial and in view of the actual proceedings that took place, since the issue, whether there was such a settlement or not, was apparently the principal contest at the trial. The court may have concluded that the findings made amounted by implication to a finding that there was no settlement as claimed by the defendant. If so, this is erroneous, for no such implication can be indulged in the light of the record as presented. The result is that there was a failure to comply with the provisions of sec. 2863, Stats. (1898), which requires, in trials of questions of fact by the court, that its decision shall be in writing and shall state separately the facts found and the conclusions of law thereon. This record is wholly barren of anything showing that the court determined this issue and it must be so treated. It is obvious that this issue was fully tried and submitted and should have been determined by an express finding of fact,

either affirming the settlement as alleged and claimed by the defendant, or denying it, according to the weight of the evidence. *Fogo v. Boyle,* 130 Wis. 154, 109 N. W. 977; *Young v. Miner,* 141 Wis. 501, 124 N. W. 660, and cases cited.

In this state of the case this court is called upon to determine whether the state of the case demands a reversal of the judgment and a new trial, or whether the evidence so clearly preponderates in favor of the claim of either party upon this issue as to require that judgment be directed in favor of the party entitled thereto upon the record. *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363; *Closuit v. John Arpin L. Co.* 130 Wis. 258, 110 N. W. 222; *Jansen v. Huerth,* 143 Wis. 363, 127 N. W. 945; *Damman v. Damman,* 145 Wis. 122, 128 N. W. 1062. An examination of the record persuades us that the preponderance of the evidence is clearly to the effect that the parties settled all their differences involved in this case and that the trial court should have found that there was an accord and satisfaction, as alleged by the defendant, which discharged the defendant from all liability arising out of the transactions embraced in the issues presented by the pleadings and the evidence. This result necessitates reversal of the judgment appealed from and entitles the defendant to judgment of dismissal of the action and for costs.

By the Court.—The judgment appealed from is reversed, and the cause remanded with directions to the trial court to award judgment dismissing the plaintiff's complaint.

UNIVERSITY OF OUR LADY OF THE SACRED HEART, Respondent, vs. CITY OF WATERTOWN and others, Appellants.

September 17—October 8, 1912.

Streets: Dedication: Plats of land: Approval: Record: Compliance with statute: Presumptions.

1. **In order to make a valid statutory dedication of land to public use, the statute must be substantially complied with.**
2. **Ch. 210, Laws of 1865, relating to the platting of lands in the city of Watertown, and prohibiting the recording of any plat until approved by the common council and a certified copy of the resolution of approval affixed in the manner therein provided, is mandatory; and a plat recorded without compliance therewith does not pass title to streets indicated thereon or show a statutory dedication to the public.**
3. **Compliance with said statute cannot be presumed where the record shows that the copy of the resolution of approval was not affixed to the plat.**

APPEAL from a judgment of the circuit court for Jefferson county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

This action was brought to restrain defendant city of *Watertown* and its officers from taking possession of and using as a public street a strip of land 75 links wide and 11.37 chains long in the Third ward of the city of *Watertown.* One of the contentions of the plaintiff is that the strip of land in question was never dedicated to the public. The court below found that the plaintiff, the *University of Our Lady of the Sacred Heart,* at the times mentioned in the complaint was and still is a corporation duly created under and by virtue of the laws of Wisconsin, located and having its principal office at *Watertown,* Jefferson county, Wisconsin; that the defendant city of *Watertown* was and still is a municipal corporation organized and existing under the laws of Wisconsin; that the defendant *Herman G. Grube* is the duly elected, qualified, and acting mayor of said city; that defendants *Charles A. Kading, Frank S. Weber, Arnold Kraeft, John T. Ryan,* and *Gustav*

Glaser were at the times mentioned in the complaint and still are members of the board of public works of said city, and the defendant *Herman C. Block* and defendant *Gustav Glaser* were at the times mentioned in the complaint and still are respectively the chief of police and street commissioner of said city; that the plaintiff is the owner in fee and in possession of all of block one (1) and also the strip of land seventy-five links wide adjoining said block 1 on the west side thereof, said block 1 and strip of land seventy-five links wide together being bounded on the east by the Chicago & Northwestern Railway Company's right of way and depot grounds, on the west by the grounds of the *University of Our Lady of the Sacred Heart,* said block 1 and strip of land adjoining it on the west and other lands of the plaintiff being marked and designated on the map as plat of Gen. H. Bertram's addition to the city of *Watertown,* Third ward, situated on section five (5), township eight (8), range fifteen (15) east, N. ½ of N. E. fractional ¼, dated April 26, A. D. 1866, and recorded May 24, A. D. 1866, at 3 o'clock p. m., in the office of the register of deeds for Jefferson county, Wisconsin; that said strip of land seventy-five links wide above described, except as it adjoins other lands of plaintiff, is shut off from the thoroughfare on the north, known as West Main street, by a substantial fence; that the plaintiff acquired said premises as a location for a university for boys and since its acquirement has used and continues to use the same for such purposes; that the plaintiff is now and it and its grantors have been since April 26, 1866, in actual, open, and exclusive possession of said strip, and up to the present time said strip has never at any time been used for any public purpose whatever; that said block 1 and said strip of land constitute a part of the campus used and occupied by plaintiff in connection with the educational institution which it maintains in the city of *Watertown;* that the south end of said strip of land, with the exception of about six inches on the east thereof, abuts on lands

owned by the plaintiff in a plat of Hubbell's addition to the city of *Watertown,* which land immediately joins on the south with the lands owned by plaintiff in the Bertram plat; that said strip of land is not correctly represented on the map of out-lots as surveyed by J. Prentice in 1870; that there is nothing described and set forth in the plat of Gen. H. Bertram's addition, recorded April 26, 1866, giving a name to said strip, and that in all conveyances thereof it has been described as a strip of land seventy-five links wide adjoining block 1 on the west side of said block; that said plat was not approved or accepted by the common council of the city of *Watertown* and was not authorized to be recorded; that on May 31, 1869, a resolution was adopted by the common council of the said city directing the city marshal to open said strip of land for a street; that said resolution was referred to the committee on streets and bridges with direction to "ascertain the law and the facts in regard to same;" that said committee thereafter and on June 30, 1869, reported against the opening of "said street," adopting as its report to the council a communication of one Emil Rothe, then city attorney, which report was adopted by the common council; that at the time of the adoption of said resolution by the council and at all times thereafter the necessity for a street at the *locus in quo* plainly existed; that, although such necessity was at all times patent, no proceedings were had by the city with reference to the opening of said strip of land for public use until those which resulted in the bringing of this action; that subsequent to the adoption of said resolution plaintiff purchased the eleven-acre residence tract marked on said Bertram's plat and other land and erected its university buildings thereon, and at a still later date purchased from the then owners said seventy-five link strip and also all of block 1, and it has since used the same as a part of the university campus; that plaintiff and the public considered the action of the common council as final, and all the plaintiff's rights were acquired in re-

liance upon the finality of the determination thus made; that values and purchase prices were fixed and the very university founded and located with a view to the environments and local accommodations for the needs of such an institution; that it needed extensive play-grounds and it needed their separation in a degree from the publicity of public streets; that it purchased the particular strip in question as had its grantors before it, and the consideration was fixed, upon the assumption that there was no public easement upon the same; that the defendant *Herman G. Grube,* as mayor of said city, and the defendants *Charles A. Kading, Frank S. Weber, Arnold Kraeft, John T. Ryan,* and *Gustav Glaser,* acting as the board of public works of said city, did on the 3d day of June, A. D. 1911, against the protest of plaintiff duly made to said board of public works, by a resolution duly adopted at a meeting of said board, instruct the defendants *Herman C. Block* as chief of police, and *Gustav Glaser* as street commissioner, to enter upon the aforesaid strip of land owned by plaintiff and remove therefrom all fences and other obstructions, if any, on said strip and to place the same in suitable condition for use as a public street, without first having acquired any right or title thereto on behalf of the city of *Watertown* or its officers, or any leave or license to enter upon the same.

And the court concluded that the plaintiff is entitled to judgment perpetually enjoining and restraining the defendants and all persons acting under them or either of them from removing the fence separating the strip of land seventy-five links wide and adjoining block 1 on the entire west side thereof as marked on the map or plat of Gen. H. Bertram's addition to the city of *Watertown,* Third ward, situated in section five (5), township eight (8), range fifteen (15) east, north half of northeast fractional quarter, dated April 26, 1866, and recorded May 24, 1866, at 3 o'clock p. m., in volume 48, page 366, in the office of the register of deeds for Jefferson county, Wisconsin, from the main thoroughfare on the

north, and entering upon and taking possession of said strip of land for use as a public street without the damages therefor having been ascertained and paid or tendered; and that the plaintiff have and recover from the defendants the costs and disbursements of this action.

Judgment was entered in accordance with the findings of fact and conclusions of law, from which this appeal was taken.

Gustav Buchheit, for the appellants.

William H. Woodard, for the respondent.

KERWIN, J. The first question presented is whether the strip of land was ever dedicated to the public. It is clear that there was no completed common-law dedication, because no acceptance by the public. But it is insisted that there was a statutory dedication. Secs. 1, 2, 3, 4, and 5 of ch. 47, R. S. 1858, were in force at the time of the alleged dedication.

Sec. 1 provides that when a person wishes to lay out a town in this state, or an addition or subdivision of out-lots, such person shall cause the same to be surveyed and a plot thereof made, which shall particularly describe and set forth all the streets, alleys, commons, or public grounds, and all in- and out-lots or fractional lots within, adjoining, or adjacent to said town, giving the names, widths, courses, boundaries, and extent of all such streets and alleys.

Sec. 3 provides that the county supervisors or proprietors of the town, addition, or subdivision of out-lots shall, at the time of surveying and laying out the same, plant and fix at a corner of the public ground, or at the corner of a public lot, if any there be, and, if there be none, then at the corner of some one of the in-lots in the town and at the corner of each out-lot, a good and sufficient stone of such size and dimensions and in such manner as the surveyor shall direct, for the corner from which to make future surveys, and the point or points where the same may be found shall be designated on the plot or map.

Sec. 4 provides that the plot or map after completion shall be certified by the surveyor, and acknowledged, and a certificate of acknowledgment shall be indorsed on the plot or map, which certificate and acknowledgment shall also be recorded and form a part of the record.

Sec. 5 provides that when the plot or map shall have been made out, certified, acknowledged, and recorded as required by this chapter, every donation or grant to the public, or to any individual or individuals, religious society or societies, or to any corporation or bodies politic, marked or noted as such upon said plot or map, shall be deemed in law and equity a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against such donor or donors, their heirs and representatives, to the said donee or donees, grantee or grantees; and the land intended to be for streets, alleys, ways, commons, or public uses shall be held in the corporate name in trust to and for the uses and purposes set forth and expressed and intended.

Sec. 4, ch. 210, Laws of 1865, relating to the platting of lots and lands in the city of *Watertown,* was in force at the time of the alleged dedication, and provides that any person owning a lot or tract of land within the corporate limits of the city of *Watertown,* who may desire to subdivide or plat such lot or tract of land into city lots, shall in platting the same cause the streets and alleys to correspond in width and general direction with the streets and alleys through the lots and blocks in said city adjacent to said tract of land so platted; "and before recording such plat, as required by law, it shall be the duty of the person or persons making such plat, to submit the same to the common council of said city for approval, and if such plat shall be approved by the common council, it shall be lawful for the party or parties making such plat, to record the same in the manner prescribed in the Revised Statutes of this state concerning town plats; but ex-

cept such plat shall be approved by resolution adopted by said common council, a copy of which, duly certified to by the city clerk, shall be affixed to said plat, it shall not be lawful for the register of deeds to receive such plat for record; and the person or persons neglecting or refusing to comply with the requirements of this act, shall forfeit and pay a sum not less than one hundred dollars, nor more than five hundred dollars, and the register of deeds who shall record such plat without such resolution of the common council thereto attached, approving the same, shall forfeit and pay a sum not less than twenty-five dollars, nor more than fifty dollars."

There was no attempt whatever made to comply with the provisions of the statute above quoted. This statute is mandatory, and absolutely prohibits the recording of the plat until approved in the manner therein provided, and makes it unlawful to receive it for record until so approved, and attaches a penalty for violation of the statute.

The law is well settled in this state and elsewhere that in order to make a valid statutory dedication the statute must be substantially complied with. *Gardiner v. Tisdale,* 2 Wis. 153; *Emmons v. Milwaukee,* 32 Wis. 434; *Fleischfresser v. Schmidt,* 41 Wis. 223; *Chicago v. Drexel,* 141 Ill. 89, 30 N. E. 774; *Brooks v. Topeka,* 34 Kan. 277, 8 Pac. 392.

It is argued that we should presume that ch. 210, Laws of 1865, was complied with. But we cannot presume a thing was done which the record shows was not done. The law required a copy of the resolution of approval duly certified to be affixed to the plat. None appears upon the plat. It is only after the plat has been made, certified, acknowledged, and recorded, as required by the statute, that the title passes. Sec. 5, ch. 47, R. S. 1858. Ch. 210, Laws of 1865, not having been complied with, the plat was not entitled to record, hence no title to the strip of land in question passed to the public. It follows that there was no statutory dedication.

It is further contended that the provisions of the Statutes

of 1858 referred to, or some of them, were not complied with, hence there was no dedication of the strip for that reason. Also that if there ever had been a dedication it was abandoned by the defendant, and that in any event the defendant is estopped from claiming that the strip was dedicated to the public. We need not and do not pass upon these contentions, since there was no statutory dedication without compliance with ch. 210, Laws of 1865.

By the Court.—The judgment of the court below is affirmed.

MONAHAN, Respondent, vs. FAIRBANKS-MORSE MANUFACTURING COMPANY, Appellant.

September 17—October 8, 1912.

Appeal: Disposition of cause: Directing judgment: Conclusiveness of mandate: New appeal by other party: Bill of exceptions.

1. Upon appeal, this court considers not only the questions arising upon the assignments of errors, but also, under sec. 3071, Stats. (1898), what disposition shall be made of the cause if any of such assignments are sustained; and counsel should present facts or argument, based upon the record, which might guide the court in the matter of such disposition.
2. The mandate of this court is conclusive upon both parties, not only as to matters actually presented to this court upon the appeal, but also as to all other matters which, consistently with legal rules, might have been presented; and where it directs the entry of final judgment by the court below there can ordinarily be no other or further proceedings in that court than to enter the judgment directed.
3. Where, in an action based on negligence, a special verdict found in plaintiff's favor upon all issues, but the trial court changed one answer therein so as to make it a finding of contributory negligence, and upon the verdict so changed granted judgment for the defendant, and on appeal by the plaintiff such judgment was reversed and the cause remanded with direction to restore

the answer which had been changed and to render judgment for plaintiff for the damages found, the defendant could not thereafter, upon a new appeal, urge that the damages were excessive or that the trial court had erred in its rulings or instructions.

4. Since in such case a new appeal by defendant would be futile, there was no error in refusing to permit him to amend the bill of exceptions or to settle a new one for the purposes of such an appeal.

APPEAL from a judgment and an order of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The appeal is by defendant from a judgment of the circuit court, also from an order refusing leave to settle a bill of exceptions and refusing leave to amend a bill of exceptions formerly settled by the plaintiff upon a prior appeal in this cause.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *M. O. Mouat* and *O. A. Oestreich.*

TIMLIN, J. This cause was formerly brought here on appeal by the plaintiff from a judgment against him. A jury had by special verdict found the negligence of the defendant and that such negligence caused an injury to plaintiff which damaged the latter in the sum of $8,000, and also finding that plaintiff was free from contributory negligence. This verdict as returned by the jury was in all respects sufficient upon its face to support a judgment for the plaintiff in the sum of $8,000. The defendant moved to change the answers of the jury to each question in the special verdict so as to substitute answers contrary to those found by the jury, and in the alternative, in case said motion should be denied, to set aside the verdict and grant a new trial because of alleged errors in

receiving and rejecting evidence and in instructing the jury, and because the verdict was contrary to the evidence and the damages were excessive. The trial court granted this motion, but only so far as to change the answer of the jury to the sixth question of the special verdict from No to Yes; that is, from a finding of no contributory negligence to a finding of contributory negligence. With the sixth question answered in the affirmative the defendant was entitled to judgment notwithstanding its negligence and the consequent injuries to the plaintiff were found. The trial court granted such judgment, and from that judgment the plaintiff took the appeal which is reported in 147 Wis. at page 104 (132 N. W. 983). This court reversed the judgment of the trial court, permitted the answer of the jury to the sixth question to stand, and remanded the cause with directions to render judgment for plaintiff for the damages found. When plaintiff's counsel moved the trial court for such judgment after the cause was remitted to that court, the defendant sought to have a new trial granted upon the ground of excessive damages, insufficiency of evidence, and erroneous rulings and instructions, and to that end proposed a bill of exceptions which the trial judge refused to allow, and also sought to amend the former bill of exceptions, which was also refused, the trial judge holding that by the mandate from this court final judgment must go for the plaintiff and no other disposition of the cause was possible or permissible.

The only question presented to this court upon the former appeal in the printed briefs and arguments was the correctness of the ruling of the trial court changing the answer of the jury as stated. The appellant assigned "error in refusing to direct judgment on said verdict. . . . In granting defendant's motion to strike out the negative answer to question 6 of the special verdict and to answer said question in the affirmative. . . . In directing judgment for said defendant," etc.

The jurisdiction of this court upon appeal is defined by sec. 3071, Stats. (1898), as follows:

"Upon an appeal from a judgment or order or upon a writ of error the supreme court may reverse, affirm or modify the judgment or order, and as to any or all of the parties; and may, if necessary or proper, order a new trial. . . . In all cases the supreme court shall remit its judgment or decision to the court from which the appeal or writ of error was taken, to be enforced accordingly; and if from a judgment, final judgment shall thereupon be entered in the court below, in accordance therewith, except where otherwise ordered."

That appeal presented the question whether there was uncontroverted evidence of contributory negligence, which alone would authorize the trial court to change the answer of the jury to the sixth question. Upon that appeal by plaintiff assigning error as stated it would have been no answer to this claim of error to aver that the damages found by the jury were excessive or that the trial court erred in its instructions to the jury. Such matters would have been wholly irrelevant in the discussion of the question aforesaid. But under the statute last quoted this court is charged with the duty of considering upon appeal not only the question of the correctness of the rulings below upon which error is assigned, but also what disposition shall be made of the cause in case such rulings are found to be incorrect. Shall the cause be remanded with directions to enter judgment for the party prevailing in this court, or remanded for further proceedings according to law, or remanded for a new trial either absolutely or in the discretion of the court below? We can in no way avoid the consideration of these questions when presented. It is one of the fundamental maxims of the law that public interest requires the termination of litigation and that suits be not strung along by successive appeals for years. Considerable delay in legal proceedings is unavoidable. But the fundamental rules of law forbid the establishment of such rules of

procedure as will increase these delays or multiply appeals. The litigant in this court is concluded by the mandate of this court as to all matters actually presented or which might consistently with legal rules have been presented to this court upon appeal. This and more has been often said by the court. *Kuenzli v. Burnham,* 124 Wis. 480, 102 N. W. 940, and cases cited; *Everett v. Gores,* 92 Wis. 527, 66 N. W. 616; *Halsey v. Waukesha Springs Sanitarium,* 128 Wis. 438, 107 N. W. 1. Whether or not judgment should have been ordered for the plaintiff or a new trial awarded was a proper subject for the consideration of this court on the former appeal. Had the reasons now presented been then laid before this court it is possible that the cause would have been remanded for a new trial. But the rules of law, founded in sound public policy, require that the integrity and binding force of final judgments be upheld. The statute quoted says in effect that final judgment shall follow in the court below unless otherwise ordered. It is argued that it is illogical or absurd to require counsel, when upholding the ruling of the court below, believing it right and contending for his belief, to present facts or argument which might guide this court in the disposition of the cause if the court found counsel wrong. It does not seem so to us. But whether or no, this result can in no way be avoided when acting under a statute which requires several different directions to the court below concerning the further proceedings in a cause depending upon the condition of the record with reference to other matters than those which are directly challenged by the appeal. For illustration see *Fleming v. Northern T. P. Mill,* 135 Wis. 157, 114 N. W. 841. It will be well for members of the legal profession to keep in mind that this question is constantly coming before this court, and make suggestions based upon the record concerning the proper disposition of the cause in the event of reversal of the judgment of the trial court. A bill of exceptions in this

cause would be as futile as an appeal. So there could be no error committed in refusing to settle a bill of exceptions or amend the former bill. There could be no other judgment than the final judgment required to be entered by the mandate upon the former appeal.

By the Court.—Judgment and order affirmed.

ZWOLANEK, Appellant, vs. BAKER MANUFACTURING COMPANY, Respondent.

September 18—October 8, 1912.

Corporations: By-laws: Offer of reward: Profit-sharing with employees: Contracts: Acceptance: Statute of frauds: Withdrawal of offer: Discharge of employee: Fraud: Contract of employment.

1. As a general rule, the by-laws of a corporation are made for its internal government and regulation, and third persons can assert no rights thereunder.
2. But a by-law of a manufacturing corporation providing that any person who should have been in the regular employ of the company for a certain time should thereupon begin to share in the surplus earnings of the company, provided he did not quit or was not discharged prior to January 1st of any year, was, when communicated to the employees, an offer of a reward for constant and continuous service and, when accepted by an employee by substantial compliance with the terms of the offer before its withdrawal, became a complete and valid contract.
3. It was not essential in such a case that the employee should have informed the company that he relied upon the offer in continuing his work.
4. The statute of frauds relating to contracts not to be performed within one year has no application to such a case, because when the contract comes into existence the only obligation is that of the company to pay what is due under it.
5. As a general rule, a person making an offer of a reward may withdraw it before it is accepted; but he must be held to the exercise of good faith and cannot arbitrarily withdraw the offer for the purpose of defeating payment when to do so would

result in a fraud upon those who in good faith have attempted to perform the service for which the reward was offered.

6. Thus, in the case stated, discharge of an employee one day before he had earned the reward, where the sole purpose of such discharge was to prevent him from securing his share of the profits offered, would not take away his right to such share.

7. The fact that an employee had been hired under a regular contract running for one year, subject to renewal, but terminable by either party on three months' notice, would not affect his right to the reward.

Appeal from a judgment of the circuit court for Rock county: George Grimm, Circuit Judge. *Reversed.*

The plaintiff and the defendant entered into a written contract whereby the plaintiff agreed to work for the defendant from June 1, 1907, to June 1, 1908, at the agreed price of twenty cents an hour to October 1, 1907, twenty-five cents an hour thereafter to January 1, 1908, and thirty cents an hour thereafter. The contract provided that it could not be terminated by either party during the period stated, without the consent of the other, except that, if either party failed in the performance of duty, then the other party might terminate the contract by giving one month's notice. It further provided that if the contract was not renewed at the date fixed for its expiration, then it was to continue indefinitely, but could be terminated by either party giving three months' notice to the other, except that if either party failed in the performance of his duty the contract might be terminated upon one month's notice by the other.

The plaintiff went to work under this contract. No new contract was made on June 1, 1908, but the parties continued their relations under the terms of the original contract. This original contract was apparently modified on December 31, 1908, by increasing the wages of the plaintiff to thirty-five cents an hour. The plaintiff continued in the employ of the defendant until December 30, 1909, when he was discharged. About January 3, 1910, the plaintiff went to work under what is claimed to be a new contract, and continued to work until

the 25th of the same month, when he quit the defendant's employ. Plaintiff was paid the amount which it was stipulated in the contract he was to receive, as well as the amount which he was entitled to recover under the subsequent modifications of that contract.

On February 24, 1899, the defendant adopted what is referred to as a by-law, which recited that the *Baker Manufacturing Company* recognized "that the earnings of capital and labor are determined by competition, and believe that after both have been paid the prices so determined all surplus earnings should be divided between capital and labor in proportion to the amounts received by each." The alleged by-law then proceeded to state the manner in which the surplus earnings were to be divided between capital and labor, and provided among other things that "any person who shall have been in the regular employ of the company for 4,500 hours during 100 consecutive weeks shall thereupon begin to participate in profit sharing, provided he does not quit the employ of the company or is not discharged prior to January 1 of any year."

The complaint alleges in substance that the plaintiff worked more than 4,500 hours during 100 consecutive weeks immediately prior to January 1, 1910, and that he was entitled to his *pro rata* share of the profits of the company for the year 1909, which share, it was alleged, amounted to $854. The defendant by way of answer alleged that the written contract governed the amount of compensation which plaintiff was to receive for his services, and that he was not entitled to receive any other or further sum; that the by-law referred to was not a part of the contract of employment, and that the same was binding solely on the members of the corporation and did not affect third persons; alleged that said defendant had the right to and did discharge the plaintiff on December 30, 1909, and that the plaintiff consented to such discharge and agreed that the relation of employer and employee should cease at that time; that the plaintiff breached his contract by tendering his

resignation on December 24, 1909, to take effect January 25, 1910; that the work performed by the plaintiff from January 3, 1910, to January 25, 1910, was performed under a new and independent contract, and that plaintiff was not entitled to participate in any share of the profits of the defendant earned during the year 1909. There was no testimony to the effect that the plaintiff when he entered upon his employment relied on the alleged by-law or that the same furnished any inducement to him to enter into or to continue in the employment of the defendant. The plaintiff did testify that, when his contract was so modified in December, 1908, as to raise his wages, he informed the defendant that such raise was satisfactory, provided he would be allowed to participate in the profits of the company in accordance with the terms of the alleged by-law, and that he was informed that he would be entitled to so participate.

At the close of the testimony the trial court directed a verdict for the defendant, because the written contract made no reference to any profit-sharing by-law or practice of the company. The court further held that although the plaintiff was informed of the existence of the by-law when the original contract was made, he refrained from stating that it affected him or formed a consideration or an inducement to enter into the written contract, and that a by-law which ordinarily deals with the internal affairs of a corporation and affects the officers and stockholders thereof would not affect the plaintiff, in the absence of a showing that it formed some consideration or inducement to the plaintiff to enter the employ of the defendant. The court further held that, if any contract was entered into between the parties in reference to profit sharing, it was not to be performed within one year and was therefore void under the statute of frauds. From a judgment dismissing the complaint on a directed verdict plaintiff appeals.

Charles E. Hammersley, for the appellant.

For the respondent there was a brief by *Olin, Butler & Curkeet,* and oral argument by *J. M. Olin* and *W. R. Curkeet.*

BARNES, J. There are a number of questions discussed in the briefs of counsel which it is unnecessary to consider in view of the conclusion reached. The case deals with a transaction which is somewhat uncommon, but raises no novel points. While the practice initiated by the defendant is beneficial to its employees, it is not difficult to see wherein it is also beneficial to the employer. It tends to induce employees to remain continuously in the employ of the same master and to render efficient services so as to minimize the possibility of discharge. It also tends to relieve the employer of the annoyance of hiring and breaking in new men to take the place of those who might otherwise voluntarily quit, and to insure a full working force at times when jobs are plentiful and labor is scarce.

It is argued at considerable length by the respondent that the profit-sharing plan of the defendant was initiated by means of the passage of a by-law, and that by-laws are made for the internal government and regulation of the corporation and its stockholders, and that third parties can assert no rights thereunder. The general rule contended for has its limitations, and it is not claimed that it would apply to a case where the by-law was communicated to the employee with the design and purpose of having him act upon it and where he in fact did rely and act upon it. To allow the employer in such a case to repudiate liability on the ground stated would come perilously near conniving at the perpetration of a fraud, and no court should say that in such a case the by-law merely affected the corporation and not third persons. The rule contended for was not established to meet such a situation and does not meet it. If corporations desire to have their so-called by-laws affect only the corporation and its shareholders, then they should refrain from exploiting them to third persons for the purpose of inducing such persons to act in reliance thereon.

We regard this by-law as being simply the offer of a reward to employees for constant and continuous service. The defendant made an offer of extra or additional compensation to

any employee who performed a certain number of hours' service within a given period, provided net profits were earned and provided the employee did not quit or was not discharged before a stated time. There is no dispute upon the point that this offer was communicated to the plaintiff when he made his original contract of employment, and the evidence tends to show that when the contract was modified in December, 1908, the plaintiff advised the defendant that the raise made in wages was satisfactory, provided he would be permitted to share in the profits, and that he was informed that he could participate therein.

"A reward is a sum of money or other compensation offered to the public generally, or to a class of persons, for the performance of a designated service." 34 Cyc. 1730.

A reward is a recompense or premium offered by the government or an individual in return for special or extraordinary services to be performed, and may be made in writing or orally, either to a particular person or class of persons, or to any and all persons complying with its terms. *Kinn v. First Nat. Bank,* 118 Wis. 537, 95 N. W. 969.

A binding and enforceable contract to pay a reward rests on one side upon a valid offer, and on the other side upon an acceptance of such offer, including its terms and conditions, by a performance of the services requested in the offer before the offer lapses or is revoked. Until acceptance by performance of the services it is merely a proposition, but when accepted by performance it becomes a binding contract, subject to the laws governing contracts generally. *Reif v. Paige,* 55 Wis. 496, 503, 13 N. W. 473; 34 Cyc. 1731, and cases cited in notes 4 to 11 inclusive.

An offer and promise to pay a reward is a proposal merely, a conditional promise on the part of the offerer, and not a consummated contract. *Haskell v. Davidson,* 91 Me. 488, 40 Atl. 330; *Janvrin v. Exeter,* 48 N. H. 83; *Pierson v. Morch,* 82 N. Y. 503; *Cummings v. Gann,* 52 Pa. St. 484; *Wilson v.*

Stump, 103 Cal. 255, 37 Pac. 151; *Williams v. West Chicago St. R. Co.* 191 Ill. 610, 61 N. E. 456; *Besse v. Dyer,* 9 Allen, 151.

The offerer may prescribe whatever terms he sees fit, and such terms must be substantially complied with before a recovery can be had. *Gardner v. Hartford,* 14 Conn. 195; *Williams v. West Chicago St. R. Co., supra; Haskell v. Davidson, supra; Besse v. Dyer, supra; Jones v. Phœnix Bank,* 8 N. Y. 228; *Freeman v. Boston,* 5 Met. (Mass.) 56.

Performance constitutes acceptance of the offer, and after performance it cannot be revoked so as to deprive a person who has acted on the faith thereof of compensation. *Bronnenberg v. Coburn,* 110 Ind. 169, 11 N. E. 29.

An offer of a reward may be accepted by any part of the public if it be offered to the public, or by any particular person or class of persons if such proposition is made to them. *Campbell v. Mercer,* 108 Ga. 103, 33 S. E. 871; *Butler Co. v. Leibold,* 107 Pa. St. 407; *First Nat. Bank v. Hart,* 55 Ill. 62.

It is not necessary that the person performing the service for which a reward is offered generally should give notice to the offerer that he accepts the offer, for in such case the party making the offer impliedly dispenses with actual notice, and the doing of the act completes the contract. *Reif v. Paige, supra; First Nat. Bank v. Hart, supra; Wilson v. McClure,* 50 Ill. 366; *Hayden v. Souger,* 56 Ind. 42; *Morse v. Bellows,* 7 N. H. 549; *Patton's Ex'r v. Hassinger,* 69 Pa. St. 311; *Shuey v. U. S.* 92 U. S. 73.

"While a mere offer not assented to does not constitute a contract, an acceptance of the terms of an offer of a reward by any person who complies therewith by performing the service creates a complete and valid contract, provided the performance takes place prior to the withdrawal of the offer." 34 Cyc. 1739, and cases cited in notes 67, 68, and 69.

Acting upon an offer and complying with its terms and con-

ditions constitute an acceptance. *Wilson v. Stump,* 103 Cal. 255, 37 Pac. 151; *Bull v. Talcot,* 2 Root (Conn.) 119; *Vigo A. Soc. v. Brumfiel,* 102 Ind. 146, 1 N. E. 382; *Haskell v. Davidson,* 91 Me. 488, 40 Atl. 330.

Literal performance is not necessary. *Haskell v. Davidson, supra; Besse v. Dyer, supra.*

Substantial compliance with the terms of the offer is in general sufficient. *Gilkey v. Bailey,* 2 Harr. (Del.) 359; *Williams v. West Chicago St. R. Co.* 191 Ill. 610, 61 N. E. 456; *Louisville & N. R. Co. v. Goodnight,* 10 Bush, 552; *Salbadore v. Crescent Mut. Ins. Co.* 22 La. Ann. 338.

Substantial compliance with the conditions of the offer must be shown in order to authorize recovery. *Burke v. Wells, F. & Co.* 50 Cal. 218; *Williams v. West Chicago St. R. Co., supra; Smith v. Vernon Co.* 188 Mo. 501, 87 S. W. 949; *Shuey v. U. S., supra.*

And it has been held that where the claimant has performed part of the service and is prevented by the offerer, or by those for whose acts he is responsible, from completing the work, he is entitled to the whole reward, or at least to compensation on *quantum meruit.* 34 Cyc. 1750.

It is manifest that the statute of frauds has no application to the case. Until the offer made was accepted by performance there was no contract, executory or otherwise. When the contract came into existence the only remaining obligation was that of the defendant to pay at once what was due under it. Neither was it essential that the plaintiff should inform the defendant that he relied on the offer in continuing his work.

The only obstacle in the way of the plaintiff's right of recovery is the fact that he was discharged one day before he had earned his reward, the further fact that defendant contends that he was discharged for sufficient cause, and the still further fact that it is asserted that plaintiff consented to his discharge.

We hold that the jury might have found from the evidence that the plaintiff had substantially performed his contract at the time of the discharge and was entitled to recover on this ground. The jury might also have found that the defendant violated its contract with the plaintiff in discharging him when it did; that there was no justification for the discharge, and that defendant's sole object and purpose in making it was to prevent plaintiff from securing his share of the profits offered to its employees; and finally that the plaintiff did not consent to his discharge. Under such a state of facts the plaintiff is entitled to recover. It is true as a general proposition that a party making an offer of a reward may withdraw it before it is accepted. But persons offering rewards must be held to the exercise of good faith and cannot arbitrarily withdraw their offers for the purpose of defeating payment, when to do so would result in the perpetration of a fraud upon those who in good faith attempted to perform the service for which the reward was offered. *First Nat. Bank v. Hart,* 55 Ill. 62, and cases heretofore cited.

The fact that the plaintiff had a written contract does not change the situation. That contract ran for one year subject to renewal, but might be terminated by either party on three months' notice. The plaintiff was not obligated by this contract to remain in defendant's employ until the reward was earned, unless he saw fit to do so. The reward related to an independent subject not covered by the contract, and one that did not affect its terms in any way.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

KUHNKE, Appellant, vs. BORDEN, Respondent.

September 18—October 8, 1912.

Accounting: Landowner and cropper: Findings of fact.

In an action involving the accounts between the owner of a farm and a cropper, the findings of fact by the trial court are *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Rock county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The defendant owned a farm in Rock county, and in October, 1907, made an agreement with the plaintiff and one Leopold by which *Kuhnke* and Leopold were to take possession of the farm March 1, 1908, and work the same for a share of the crops and income. Leopold later assigned his interest to the plaintiff with defendant's consent, and the plaintiff occupied the farm from some time in 1908 until January, 1912, when this action was commenced. The agreement contained numerous stipulations as to the furnishing of stock, seed, sale of milk, etc., which need not be particularly stated, except that by one clause it was agreed that the defendant had the right to sell the products of the farm, including the milk, receive the proceeds, and apply the money received on any indebtedness due him from the plaintiff. The action is brought to recover some $2,000 for services rendered, moneys wrongfully retained by defendant from the sale of farm products, and damages for failure to perform certain agreements of the contract. The defendant claimed that in February, 1911, all the accounts between himself and the plaintiff (except the account for milk and cream sold) were examined by them, and it was found and agreed between them that there was then due the defendant from the plaintiff $341.52; that subsequently the defendant sold produce from the farm of which the plaintiff's share amounted to something more than $200,

which amount the defendant credited upon the balance found due him upon the settlement; that the amounts received by defendant upon the sale of milk and cream were accounted for each month, and the amounts due the plaintiff paid to him and retained by him without objection.

The case was tried by the court without a jury and findings made in substance in full accordance with the defendant's contention. By these findings it appeared that there was still due the defendant from the plaintiff a trifle more than $100, and judgment was rendered dismissing the complaint, from which the plaintiff appeals.

J. J. Cunningham, for the appellant.

For the respondent there was a brief by *Jeffris, Mouat, Oestreich & Avery,* and oral argument by *O. A. Oestreich.*

WINSLOW, C. J. There was ample evidence in support of the findings of fact of the trial court, hence the judgment must be affirmed, unless there was some prejudicial error in the admission of evidence or other rulings on the trial, as a result of which some substantial right of the plaintiff has been affected.

A number of rulings are attacked by the appellant as erroneous and substantially prejudicial, but after careful examination we do not deem any of these claims well founded or of sufficient importance to justify treatment in detail.

By the Court.—Judgment affirmed.

Oscar Smith & Sons Company, Respondent, vs. Janesville Batting Mills, Appellant.

September 18—October 8, 1912.

Sales: Inferiority to sample: Burden of proof: Acceptance: Right to rescind.

1. **Where the vendee claims that goods sold by sample are inferior thereto, but has accepted the goods so that his remedy, if any, is limited to a reduction of the claim for the purchase price, the burden of proof is upon him, in an action for such price, to show the inferiority to sample.**
2. **Where the vendee of cotton waste sold by sample retained the same for five weeks and, after using a portion of it, treated the whole, although unsuitable for his use, as his own by offering it for sale and endeavoring to have the vendor sell it for his account, there was such an acceptance of the goods as passed the title and precluded a rescission on the ground of inferiority to sample.**

Appeal from a judgment of the circuit court for Rock county: George Grimm, Circuit Judge. *Affirmed.*

Action for the purchase price of some baled cotton waste, sold defendant by sample and delivered into its possession. There was no dispute as to the contract or amount of the goods. Defendant answered that the cotton was inferior to the sample; that it seasonably discovered such fact and notified plaintiff thereof and asked for orders for disposition and reshipment. Defendant, also, counterclaimed for $800 damages and the full purchase price of the cotton.

According to the evidence the cotton was sold for use in manufacture of cotton batting; to make a particular inspection it was necessary to open each package, but the customary way was to insert and draw some of the material from different portions of the bales by use of a hook. When the property arrived defendant took the same into its possession without making any inspection. Soon thereafter it opened up a bale and tried to work it, thereby discovering that it was im-

practicable to do so with the machinery in use. Plaintiff was promptly apprised thereof and requested to sell the stuff for defendant's account. Both parties endeavored to resell, no suggestion being made of any difficulty as regards its not being equal to the sample. The difficulty was supposed to be in working the stock with the machinery in use. Some five weeks elapsed after the first inspection during which there were several communications between the parties. Failing to find a market, either by itself or by plaintiff, for the stock, defendant examined several more bales and then pronounced the property not acceptable as fulfilling the contract, and, in effect, rejected the same. There was evidence tending to show that some of the bales contained cotton equal to or better than the sample and others not; but, that the average was substantially equal thereto; also evidence that, as to such kind of property, it was to be expected bales would vary in quality and the thing to expect was an average as compared with the sample.

The court instructed the jury that, in the circumstances of the case, the burden of proof was on defendant to maintain its claim that the goods were not equal to the sample. The jury found for the plaintiff.

J. J. Cunningham, for the appellant.

M. P. Richardson, for the respondent.

MARSHALL, J. The instruction as to the burden of proof being on the defendant "to show that . . . the waste was inferior to the sample and was not substantially like it" was proper, if there were evidence to go to the jury on the question of whether appellant accepted the property, and its remedy, if it had any, was limited to reducing respondent's claim by the difference between the contract price and the fair market value of the cotton.

The rule counsel for appellant contends for, citing *Grenawalt v. Roe,* 136 Wis. 501, 117 N. W. 1017, applies where

there has not been an acceptance of the property tendered on the contract of purchase. That there was such acceptance in this case, so, at least, as to pass title and preclude rescission, the trial court might well have considered conclusive and so taken that question from the jury. Appellant, after having made an inspection of one bale, selected as a sample of the whole shipment, made no complaint as to the quality not being up to contract. The conduct of appellant for some five weeks thereafter is consistent only with the theory that it had accepted the goods; but found the same unsuitable for use with its machinery.

Where goods are tendered on contract with express or implied warranty, the buyer must within a reasonable time notify the seller that they are not accepted at all on such contract or be precluded from the defense of rescission, and notify the seller that they are not accepted as satisfying the contract, or be precluded from defending against an action for the purchase price on the ground that such goods do not satisfy the calls of the agreement. *Ashland L., S. & C. Co. v. Shores,* 105 Wis. 122, 81 N. W. 136; *Northern S. Co. v. Wangard,* 117 Wis. 624, 94 N. W. 785; *H. McCormick L. Co. v. Winans,* 126 Wis. 649, 105 N. W. 945; *Forster, W. Co. v. F. MacKinnon Mfg. Co.* 130 Wis. 281, 110 N. W. 226.

Certainly, appellant waived its right to defend against an action for the purchase price on the ground that it had not become the owner of the property by waiting five weeks after taking the same into its possession, and in the meantime, and after having used up a portion of the goods, treating the whole as its own by offering the same for sale and endeavoring to have respondent sell the same for its account. The logic of the rule that in case the goods tendered upon an executory contract are accepted so as to waive the right to reject, in an action for the purchase price the burden is upon the buyer to sustain his claim, if one be made, of breach of warranty, is plain. A party cannot be owner of the property and refuse

to pay for it as agreed upon, without showing a breach and damage. Having become the owner and remained such, because the seller will not accept rescission and the buyer has forfeited his right thereto, *prima facie,* he is answerable for the agreed price.

No objection is made to that part of the instructions as regards its being sufficient, in the circumstances of the case, if the quality of the goods was substantially up to the sample. The instruction was proper, at least as applied to the facts of the case. Such being the situation it seems the verdict in respondent's favor cannot be disturbed. There was very definite evidence that while some of the stock was inferior to the sample, some was better, and that, in trade dealings respecting such property, it is not to be expected that every bale will be equal to the sample; that if some are above and some below; but, on the whole, the lot averages with the sample, it is to be regarded as substantially equal thereto. The question in respect to the matter was one of fact. The manner of its submission to the jury, except the feature respecting the burden of proof, is not complained of. Therefore it is considered that the judgment must be affirmed.

By the Court.—So ordered.

BILGRIEN, Appellant, vs. ULRICH, Respondent.

September 18—October 8, 1912.

Slander: Justification: Truth of charge: Other instances: Pleading: Evidence: Acquittal in criminal prosecution: Appeal: Harmless errors: Briefs.

1. In an action for slander where the complaint alleged that defendant had said of plaintiff, a manufacturer of cheese, that he was a swindler and a cheat and that he had swindled and cheated one of his patrons by wrongfully accusing such patron of having sold adulterated milk, for the corrupt purpose of extorting money from said patron, the defendant, pleading in defense the truth of the words spoken, was properly allowed to allege and prove other instances in which plaintiff had extorted money from his patrons in a like corrupt manner, tending to show that he was in the habit of cheating and swindling them.
2. In such action the admission of testimony as to the state of health of the patron named in the alleged slanderous words at the time plaintiff is alleged to have extorted money from him, was not prejudicial error.
3. Acquittal in a criminal prosecution is not competent evidence against the defendant in a civil action, brought by the person so acquitted, for a slander alleged to have been uttered concerning the transactions involved in the criminal case.
4. A brief assigning error upon the refusal to instruct as requested and upon the giving of portions of the charge, referring to pages in the printed case, but not giving the portions of the charge excepted to or the substance thereof, and not stating the principles of law applicable thereto, is not a compliance with Supreme Court Rule 10.

APPEAL from a judgment of the circuit court for Dodge county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

The plaintiff, who at the time the alleged cause of action arose was a manufacturer of and dealer in cheese, brings this action for slander, alleging that the defendant spoke of and concerning him in the German language words which when translated into the English language are as follows:

"*H. Bilgrien* is a swindler and a cheater, that he had no right to take Ulrich in the cellar in order to settle with him

there;" "*H. Bilgrien* is a swindler, he can do more than eat bread, Albert Koepernick can go and tell him what I have said here;" and "*Bilgrien* is a swindler and cheat that he no right had Ulrich in cellar to take and with him settle could."

The court overruled a demurrer to the complaint, holding the allegations of the complaint constituted an actionable wrong.

The answer recites the alleged details of several transactions between the plaintiff and persons who sold milk to him, wherein it is alleged to have been stated that the plaintiff had secured notes and money from such persons by threats that he would prosecute and have such persons sent to state prison because they had sold him adulterated milk, if they would not settle with him. It is also alleged that the plaintiff had sent an unexecuted note to one person who sold milk to him, with a threat of prosecution if he did not sign and return the note to the plaintiff. It is also alleged that it was the practice of the plaintiff to attempt to secure sums of money from persons who sold milk to him, upon the threat of prosecution for the offense of selling adulterated milk if they should fail to meet his demand. It is admitted that the words alleged in the complaint were spoken in substance and it is alleged that the words were in fact true. The court denied plaintiff's motion to strike out parts of the answer.

It appeared from the evidence admitted that the plaintiff had been arrested in connection with a transaction with one of the persons who sold milk to him and the alleged details of the transaction were set out in the answer, but the court excluded the record in the case against the plaintiff and the result of that prosecution.

The jury returned a verdict for the defendant, and judgment dismissing the complaint was awarded. This is an appeal from such judgment.

For the appellant the cause was submitted on the brief of *James E. Malone.*

For the respondent there was a brief by *Naber & Wheeler,* attorneys, and *Husting & Brother,* of counsel, and oral argument by *Emil Naber* and *Paul O. Husting.*

Siebecker, J. Plaintiff's motion to strike out portions of the answer, which allege a justification for speaking the words charged as slanderous, was properly refused. The alleged slander charged the plaintiff with being a swindler and a cheater in dealing with his patrons who sold milk to him in his business of manufacturer and dealer in cheese, and specified particular acts of extortion of money from patrons by falsely accusing them of having sold him adulterated milk. The defendant alleges that the charges were true, and in justification thereof sets out in the answer a number of instances wherein the plaintiff is charged with having wrongfully accused patrons of having sold him adulterated milk with the intent and for the purpose of thereby wrongfully and corruptly extorting money from them. The alleged slander charges the plaintiff with being a swindler and a cheater generally and specifies particular acts. The words alleged to have been falsely spoken are actionable as tending to prejudice and injure the plaintiff in his trade and business, under the special circumstances set out in the complaint. *Gottbehuet v. Hubachek,* 36 Wis. 515; *Servatius v. Pichel,* 34 Wis. 292; *Brown v. Vannaman,* 85 Wis. 451, 55 N. W. 183. The allegations of the complaint are that the defendant slandered the plaintiff by imputing to him the habit of swindling and cheating in conducting his business of cheese maker, and connect therewith the specific charge of swindling and cheating Gustav Ulrich, one of his patrons, by wrongfully accusing Ulrich of having sold the plaintiff adulterated milk, for the corrupt purpose of extorting money from Ulrich. The portions of the answer which plaintiff moved to strike out allege, by way of defense, that the plaintiff had so extorted money from Gustav Ulrich, and specify other instances wherein the

plaintiff had wrongfully extorted money from his patrons in a like corrupt manner. It is plain that the specifically alleged acts of plaintiff's wrongful conduct are particular acts of the nature and kind that tend to show a habit of swindling and cheating. The facts and circumstances as alleged clearly constitute a proper defense to the alleged slander within the rule of the following decisions, which permits the defendant to show specific acts tending to show that the plaintiff was in the habit of cheating and swindling and that he extorted money from patrons who furnished him with milk in his business of manufacturing cheese: *Talmadge v. Baker,* 22 Wis. 625; *Kimball v. Fernandez,* 41 Wis. 329; *Adamson v. Raymer,* 94 Wis. 243, 68 N. W. 1000. Since the matter thus alleged is a proper defense, it also follows that all objections by plaintiff to competent and material evidence in support of these defenses were properly overruled.

It is urged that the admission over objection of the testimony of Dr. Bachhuber, concerning Gustav Ulrich's state of health at the time the plaintiff is alleged to have wrongfully extorted money from him, is prejudicial error. While it is not clear that this evidence threw any light on the subject under investigation, we are persuaded that its reception did not affect the substantial rights of the parties, and hence its reception cannot in any view be deemed prejudicial error. Sec. 3072*m,* Stats. (Laws of 1909, ch. 192).

Error is assigned on the ruling of the court excluding plaintiff's attempt to offer in rebuttal the records and files in the case of *The State v. Bilgrien* (plaintiff here), showing that the plaintiff was acquitted of the charge of criminal practices in extorting money from the defendant's brother. Counsel cites no adjudication to our attention to the effect that a verdict of acquittal in a criminal prosecution is competent evidence in a civil action, instituted by the defendant in the criminal case, against another person to recover damages for a slander alleged to have been uttered concerning the trans-

actions involved in the criminal case. It is elementary that no person who is a stranger to an action or proceeding is bound by the result thereof, and that, although the same facts may be involved in a civil and a criminal case, the judgment found in one is not evidence in the other of the facts on which it is rendered. The point here raised was referred to in *Winn v. Peckham,* 42 Wis. 493, 500, in a comment on the case of *Corbley v. Wilson,* 71 Ill. 209, wherein the court ruled that the record of the proceedings in the criminal case was not competent evidence in a slander suit, under the identical circumstances here presented. This court in the *Winn Case* states: "Undoubtedly *Corbley v. Wilson* was correctly decided." See, also, 7 Ency. of Ev. p. 850, subd. IV, par. 1.

Error is assigned upon the court's refusal to instruct as requested and upon the giving of portions of the instructions to which there was exception. Appellant's brief refers to pages in the printed case and does not give the portions of the charge covered by these exceptions or the substance thereof. Nor is there a presentation of the principle of law applicable thereto, as is required by the rules governing the printing of briefs in causes in this court. The practice indulged in here is not a compliance with such regulations. *Radichel v. Kendall,* 121 Wis. 560, 99 N. W. 348. We have, however, examined the exceptions and the charge of the court and find that the instructions given by the court fully cover the issues submitted to the jury and correctly state the law applicable thereto. There is no reversible error in the record.

By the Court.—The judgment appealed from is affirmed.

SCHNORENBERG and others, Appellants, vs. SCHNORENBERG, Respondent.

September 18—October 8, 1912.

Executors and administrators: Giving bond: Extension of time: Stay of proceedings.

1. Where, after requiring an executrix appointed by the will without bond to give a bond, the county court made an order staying all proceedings for thirty days, it had power to accept and approve a bond given by the executrix after the expiration of the stay.
2. Nothing in secs. 3794, 3795, or 3796, Stats. (1898), precludes such extension of the time for giving bond. The provision in sec. 3796 that "no person named executor in any will, who neglects to qualify for twenty days after probate thereof, shall intermeddle or act as such," merely forbids the executor before qualification to take upon himself the duties of executor or to interfere with the property of the estate.

APPEAL from an order of the circuit court for Washington county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

For the appellants the cause was submitted on the brief of *Sawyer & Sawyer* and *J. H. Schnorenberg.*

J. C. Russell and *E. A. Merton,* for the respondent.

TIMLIN, J. Mathias Schnorenberg on January 2, 1911, died testate. By his will his widow, the respondent, was given a life estate in certain personal property, which after her death was bequeathed to his four sons share and share alike. He therein appointed the respondent executrix without bond and two of his sons trustees to take charge of the estate after the death of the widow and convert the same, except the residence property, into money and divide the money according to said will. Petition was made for the probate of the will and the appointment of respondent as executrix. Three of the sons filed objections to such appointment on the ground that she was not competent to act in that capacity or

to discharge the duties of that position. The county judge on February 28, 1911, found the respondent legally competent and entitled to letters testamentary, but required her to file a bond with sureties in the sum of $50,000. The sons, intending to appeal from such order to the circuit court, at once asked for a stay of proceedings on the part of the executrix for thirty days. Following a memorandum in the minutes of the court stating the contents of the order appears the following: "Stay of proceedings granted for thirty days. Bond in case of appeal fixed at $250." Objectors having appealed from said order, on April 3, 1911, they filed in the county court a request for the appointment of an administrator with the will annexed, representing that the respondent had not complied with the order of February 28, 1911, and filed her bond. April 6, 1911, the county court, without notice or hearing, overruled this request and ordered that letters testamentary issue to respondent and approved her bond and issued letters testamentary. From this order appellants appealed to the circuit court. The last named court on June 24, 1911, remanded this appeal to the county court with directions to that court to make and enter an order in writing stating definitely the order that was actually made by him on February 28, 1911, relating to the stay of proceedings, etc. Pursuant to the last named order the matter was again brought on for hearing before the county judge upon affidavits, from which it appeared that the request for stay of proceedings originally made was to stay proceedings on the part of the executrix and that the object of making such request was to preserve the *status quo* with reference to the custody and possession of the personal estate, which was in the hands of a special administrator pending the proposed appeal. Upon these affidavits and after hearing counsel the county judge made a more definite order stating that the order of February 28, 1911, directed by the court, was an order staying all proceedings for thirty days from said date. This evidently was understood

as staying the proceedings of qualifying by giving bond, etc. This was returned to the circuit court on appeal in due form and thereupon that court made the order appealed from affirming the order of the county court of April 6, 1911, appointing the respondent executrix and accepting and approving her bond. The first appeal from the county court to the circuit court from the order of February 28, 1911, is still pending and undetermined. No point is made against the regularity of this remand, action below, and new return.

From this it appears that the only question raised upon the appeal before this court is whether the county court has power, after requiring an executrix appointed by the will without bond to give bonds and after stay of proceedings on such order, to interpret such stay as extending the time within which she must give bond, or its expiration as fixing the commencement of the period within which she must give bond, or whether he has power to accept and approve such bond given by her more than twenty days after the date of the order requiring the bond. Secs. 3794, 3795, and 3796, Stats. (1898), are relied upon by the appellants. The first requires every executor to give bond; the second exempts from this requirement executors named in a will when the testator has ordered or requested in his will that no bond be required. But in this case, notwithstanding such order or request, the county court may order a bond. Sec. 3796 provides that if the person named as executor in any will "shall, . . . for the space of twenty days after the probate of the same, neglect to give bond as required by law, the county court may grant letters testamentary to the other executors named in the will, if any, who are capable and will accept the trust and give bond. If all named as executors neglect to qualify the court may commit administration of the estate, with the will annexed, as provided in sections 3807 and 3808. No person named as executor in any will, who neglects to qualify for twenty days after probate thereof, shall intermeddle or act as such."

It is said that these statutes are mandatory, particularly the last clause of sec. 3796, *supra*. This clause merely forbids the executor before qualification to take upon himself the duties of executor or to interfere with the property of the estate. Taken all together we find no language in the statutes expressly or by reasonable implication forbidding the county judge to do what was done in this case. His action was well within the powers of any judicial officer at common law. Indeed, many executive and administrative officers have power to permit acts in obedience to their orders to be done after the time specified. Even statutes fixing time within which an act should be done are often construed as directory and the act done afterwards valid. We think the sections of statute cited do not touch this case, and the act of approving her bond and issuing letters testamentary entirely within his power, although more than twenty days had elapsed since he made the first order appointing her and requiring the bond. It follows that the order of the circuit court must be affirmed.

By the Court.—Order affirmed.

MERTON, Appellant, vs. MICHIGAN CENTRAL RAILROAD COMPANY, Respondent.

September 18—October 8, 1912.

Railroads: Injury to passenger: Negligence: Customary appliances. Door of toilet room: Failure to provide door check.

Where the door to the toilet room in a passenger car was constructed and operated as such doors usually are, and there was nothing obviously dangerous in such construction or operation, failure to provide a door check to prevent it from closing suddenly was not such negligence on the part of the railroad company as renders it liable for an injury to a passenger who, as he was about to close the door, lost his balance by reason of a sudden swaying of the car, thrust his hand against the jamb of the door to save himself from falling, and was injured by the sudden closing of the door upon his thumb, caused by the same swaying of the car.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

Action for personal injury. On the 15th day of July, 1910, the plaintiff, having theretofore purchased transportation over the defendant's road from Chicago to Niagara Falls and return, boarded one of its trains at the latter place bound for Chicago. In the evening he entered the toilet room of the car. While in the act of turning around to close the door upon leaving the room, owing to a sudden swaying movement of the train he lost his balance, and, to avoid falling, thrust his hand against the jamb of the door next to the hinges. The swaying motion of the car caused the door to close, and the thumb of his right hand was caught in the space between the jamb and the door and was crushed and bruised.

The negligence charged in the complaint was that the defendant ran its train at such an excessive rate of speed as to cause it to lurch, and that it neglected and failed to provide the door of the toilet room with any spring or check to keep the same from shutting with great force and violence by reason of any unusual jerk or lurch of the train, and that it had no railing or contrivance of any nature which the plaintiff might have grasped in order to keep himself from falling, except the jamb of the door.

The jury returned a special verdict: (1) that plaintiff was injured on July 15, 1910, while a passenger on defendant's road (answered Yes by the court); (2) that the defendant was guilty of negligence in not providing the door to the men's toilet room with a door check; (3) that such negligence of the defendant was the proximate cause of plaintiff's injury; (4) that plaintiff was guilty of negligence that contributed proximately to produce his injury; and (5) damages $280.

On the coming in of the verdict plaintiff's counsel moved the court to change the answer of the jury to the fourth question of the special verdict from Yes to No and for judgment on the verdict thus corrected, and defendant's counsel moved the court to change the answer of the jury to the second ques-

tion of the special verdict from Yes to No and to strike out the answer of the jury to the third question of the special verdict and for judgment on the verdict as corrected. The court granted the motions of both parties to correct the verdict, and entered judgment for the defendant dismissing plaintiff's complaint upon the merits with costs, from which he appealed.

For the appellant there was a brief by *Merton, Newbury & Jacobson,* and oral argument by *M. A. Jacobson.*

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *J. G. Hardgrove.*

Vinje, J. It is claimed the trial court erred in changing the answer to question 2 from Yes to No, thus exonerating defendant from negligence in the construction and operation of the door. The evidence shows that it was made of mahogany; was twenty-two inches wide, six feet four inches high, about an inch and a quarter in thickness, and swung freely on the hinges. In other words, it was the kind of toilet-room door usually found in a Pullman or sleeping car. A door is one of the most common appliances of civilized man, and its mode of operation is understood by everybody. The door in question was somewhat below medium width. In other respects it did not differ in its construction and operation from the great mass of doors in common use wherever a door is needed. It is claimed, however, it should have had a door check, so that it would have closed automatically. Perhaps such a door check would have prevented the accident in question. But we do not understand, and fail to find from the evidence, that it is the office or purpose of a door check to prevent accidents of this or a similar nature. A careful consideration of the probable effect of a pneumatic door check might lead to the conclusion that it would cause more accidents to fingers on the hinge side of the door jamb than it would prevent. But be that as it may, the fact remains that

the door was constructed and operated substantially in the same manner that the great mass of such doors in all cars are constructed and operated, and that there was nothing obviously dangerous in such construction and operation. Such being the case, defendant came within the rule that a person who uses a customary appliance which is in good repair and not obviously dangerous, in a usual and customary manner, is free from negligence. *Guinard v. Knapp-Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671; *Innes v. Milwaukee,* 96 Wis. 170, 70 N. W. 1064; *Prybilski v. Northwestern C. R. Co.* 98 Wis. 413, 74 N. W. 117; *Yazdzewski v. Barker,* 131 Wis. 494, 111 N. W. 689; *West v. Bayfield M. Co.* 144 Wis. 106, 128 N. W. 992; *Bandekow v. C., B. & Q. R. Co.* 136 Wis. 341, 117 N. W. 812; *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982; *Willette v. Rhinelander P. Co.* 145 Wis. 537, 130 N. W. 853; *McGinnis v. Northern P. Mills,* 147 Wis. 185, 190, 132 N. W. 897, 133 N. W. 22. This is in harmony with the rule requiring carriers of passengers to exercise the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the practical conduct of such business under the same or similar circumstances, as reaffirmed in *Ferguson v. Truax,* 136 Wis. 637, 118 N. W. 251, for the evidence shows that ordinarily carriers of passengers do not equip toilet-room doors with door checks. Of course if it can be shown, as it was in the case of *Creason v. St. L., I. M. & S. R. Co.* 149 Mo. App. 223, 130 S. W. 445, relied upon by plaintiff, that the appliance is obviously dangerous, so that an ordinarily prudent man may reasonably anticipate that injury to another may probably follow as a result of its construction or mode of operation, then it falls within the exception stated in *Jensen v. Wis. Cent. R. Co.* 145 Wis. 326, 128 N. W. 982, and proof of custom of its use will not operate as a defense to the charge of negligence. In the *Creason Case* the door knob was placed so close to the edge of the door that it could not be closed with the hand on the knob without the hand striking

the door casing. The object of a door knob is to enable the door to be opened and closed by the use of the hand on the knob. Obviously, therefore, if the knob is so close to the door casing that a finger between the knob and casing will be crushed or pinched when the door is being closed it constitutes an appliance in itself obviously dangerous—one from which injury is almost certain to result, as the hand must be placed on the knob in closing the door and usually cannot be withdrawn in time to avoid contact with the door casing if placed too near it. Not so in the case at bar. Ordinarily in using a door a person's hand does not come in contact with, or near to, the door jamb to which the hinges are affixed. Only on account of some unusual occurrence or of some unforeseen combination of circumstances will it be placed there, and then the chance of its being caught as was plaintiff's hand is slight. Hence we conclude the trial court properly changed the answer to question number 2. This conclusion renders it unnecessary to decide the question of plaintiff's contributory negligence, but we cannot forbear adding that we find nothing in the evidence to support the verdict on that subject.

By the Court.—Judgment affirmed.

ILLINOIS SURETY COMPANY, Appellant, vs. MAGUIRE, Respondent.

September 18—October 8, 1912.

Contracts: Construction: Indemnity against liability.

A written contract to protect and indemnify another against loss, damage, or expense which he may sustain "or become liable for" in consequence of a certain act, is an agreement to protect against liability as well as damage, where the words quoted are not controlled by any other provisions of the contract.

APPEAL from a judgment of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *Holt & Coombs,* and for the respondent on that of *Merton, Newbury & Jacobson.*

WINSLOW, C. J. In this case one question is presented by demurrer to the complaint, and that is the question whether a written agreement to protect and indemnify another against loss, damage, or expense which he may sustain "or become liable for" in consequence of a certain act, is an agreement to indemnify against actual damage alone, or to indemnify against liability as well. We can entertain no doubt that it must be construed as an agreement to protect against liability as well as damage. *Hoven v. Employers' L. A. Corp.* 93 Wis. 201, 67 N. W. 46. To hold otherwise would be to eliminate the words "or become liable for" from the contract. This cannot be done: the words are apt and unmistakable. They are not controlled by any other provisions of the contract, and must receive their natural meaning. It follows that the judgment appealed from was erroneous.

By the Court.—Judgment reversed, and action remanded with directions to overrule the demurrer to the complaint, and for further proceedings according to law.

ALLEN, Respondent, vs. GREEN BAY MANUFACTURING COMPANY, Appellant.

September 19—October 8, 1912.

Master and servant: Injury from unguarded saw: Assumption of risk: Latent danger: Directing verdict.

1. Plaintiff was injured by a small piece of wood thrown forward by an uncovered circular rip-saw which he was operating in defendant's factory. Upon evidence showing, among other things, that he was experienced in and familiar with the dangers of such work and must have known that pieces of wood were constantly accumulating on the saw table and, by a slight vibration of the table, were being caused to move towards the

back of the saw where its teeth came up through the table, it is *held* that defendant's negligence, if any, consisted in using the uncovered saw; that plaintiff had assumed the risk of injury therefrom; and hence that a verdict for defendant should have been directed.

2. The vibration of the saw table in such case, being obvious to ordinary attention, was not a latent danger against which defendant was bound to warn the plaintiff.

Appeal from a judgment of the circuit court for Brown county: S. D. Hastings, Circuit Judge. *Reversed.*

Action for a personal injury. Plaintiff was injured, in the employ of defendant, working at a small circular saw. A piece of wood was caught on the up-spring of the saw teeth and thrown forward striking plaintiff in the eye. The saw was uncovered. The trial was on the theory of negligence in having the uncovered saw being the proximate cause of the injury, resulting in a verdict for plaintiff and assessing damages at $4,500. On motion, a new trial was ordered on the ground of assumption of risk; that the danger was as well known to plaintiff as to defendant. The second trial was in another jurisdiction and before another judge. The evidence was substantially as before but upon the theory of a latent danger, inherent in the machine, known or ought to have been known to defendant, and not known to plaintiff, and negligence in not informing him thereof. The claimed danger consisted of such trembling of the machine table as to cause small pieces of wood, which customarily dropped on the table during the progress of the work, to move forward toward the back of the saw and around so as to come into contact with the teeth. There was no defect in the machine or manner in which it was operated. The saw was on a small arbor and so the top was some four or five inches above the table. The work consisted in sawing, from long strips of wood, small pieces for chair braces. The pieces were about four inches long on one edge, two inches on the other, and one and a half inches thick. They were cut from long oak or elm strips. Because of the

way the blocks were cut, a rip-saw did the work somewhat better than a cross-cut, though both had been used. The shape of the saw teeth on the rip-saw was such that a piece of wood coming in contact with them at the back was liable to be thrown as in the particular instance. Such an occurrence would not be liable to happen with a cross-cut saw. The machine was supported on a solid head and not connected with the table, but that was caused to tremble by the motion of the machinery so as to cause such an accident as happened, under the circumstances. The trembling was not easily observable by sight, independently of its causing pieces of wood to move around thereon. It had not been supposed to involve any danger to the operator. One could appreciate the trembling by putting a hand on the table. Plaintiff claimed that he never did that but placed his hands only on the piece of wood he was feeding into the saw. In the operation pieces for use were removed to the left. Blocks or small pieces, treated as waste, would accumulate on the table and be pushed back by the moving up of the stock being sawn. In the course across the table they were liable to move along to the back of the saw. Plaintiff was thirty-six years of age. He had been employed in and about saw or planing mills for some twenty years. He had worked at machinery much of the time and was generally familiar with such machines as the one in question. He had worked in the particular mill over a year and on account of his experience was employed as subforeman. He had worked considerable attending rip-saws and knew their peculiar features. He knew how to file and set such a saw and the importance of having it armed with a hood or splitter to prevent its throwing sawdust or pieces of wood. He had explained that to the superintendent. The saws plaintiff had been accustomed to work at in other factories were furnished with appliances to prevent such dangerous movements of wood. He put the saw on, in the particular instance, and was permitted to use it or the cross-cut as he chose. He claimed he

did not notice the trembling of the table before the accident and had not been warned against it or any danger but that of getting his fingers into the saw.

The court after denying a motion on behalf of defendant for a directed verdict submitted the cause to the jury resulting in the following findings: The vibration of the table was the sole cause of the piece of wood coming in contact with the saw and being thrown in the direction of plaintiff, with the result complained of. He did not know that such vibration was sufficient to cause such an occurrence. Defendant, in the exercise of ordinary care, ought to have apprehended such danger. Defendant was guilty of negligence in failing to warn plaintiff thereof. Such negligence was the proximate cause of the accident. Plaintiff was not guilty of any want of ordinary care proximately contributing to produce the injury. He was damaged to the extent of $2,500. Judgment was rendered accordingly.

For the appellant there were briefs by *Williams & Stern,* of counsel, and *Kittell & Burke,* attorneys, and oral argument by *B. F. Williams.*

For the respondent there was a brief by *Minahan & Minahan,* and oral argument by *V. I. Minahan.*

Marshall, J. Was there any sound basis in the evidence for submitting the cause to the jury on the theory that it was inferable that appellant failed to exercise ordinary care in not informing respondent of the slight trembling of the saw table, and that such fault was the proximate cause of the accident without any want of ordinary care on respondent's part proximately contributing thereto? Much as we respect the judgment of the able circuit judge who presided at the trial, we confess that if such basis exist we cannot discover it. We are constrained to hold that the trial judge grievously erred.

The case, as indicated in the statement, was once tried on the theory of negligence in using an uncovered saw. That

seems to have been a very logical deduction from the facts. The court decided there was such negligence but that respondent was as much at fault as appellant and, manifestly, assumed the risk. The evidence on the second trial, evidently, did not vary much from that on the first. It only showed, at best in addition, there was a slight trembling of the table, not involving any defect in the machine or its setting or connections; but causing small pieces of wood to move around on the saw table,—trembling, so insignificant that respondent did not notice it and appellant did not consider it of sufficient importance to call the former's attention thereto.

The evidence shows that the saw arbor and connections rested on a solid foundation not attached to the saw table or the floor. Therefore, the trembling must have been communicated from the floor and, probably, was partly caused by the motion of the machinery, in general, of the factory. It does not seem possible such trembling could have existed without being observed by respondent, certainly as well as by appellant's vice-principal. If it caused pieces of wood to move around on the table or backward toward the point of the upspring of the saw teeth, it was right before respondent's eyes. He could not have avoided seeing it had he paid any reasonable attention to his surroundings, which by a very familiar rule, he was bound to do or to take the consequences of his negligence. The reason why he could not recover, on the first trial, was because he knew perfectly well the saw was unguarded and was liable to throw toward him any piece of wood which might come in the way of the teeth from the point where they come up through the table to where they turned down in front. Why, then, was there any question to submit to the jury involving mere means by which such interferences were liable to occur so long as the operation of such means was obvious to ordinary attention? It seems quite illogical to hold there was negligence and contributory negligence in the first situation and negligence and no contributory negligence

in the second. Really, we cannot perceive why there was negligence at all in failing to inform respondent of that which was a mere incident of his situation and which, with the large experience he had, he must have known as well as appellant's agent. The evidence shows, very plainly, that he was very familiar with the dangers of operating a circular saw without any guard thereon to prevent its throwing pieces of wood. Knowing that, as he did, and knowing as he must have, that pieces of wood were constantly being accumulated on the saw table and caused to move backward by the slight trembling thereof and the additions in front, it seems quite clear that whatever negligence there was consisted in operating the uncovered saw and that respondent accepted that danger. It follows that the cause should have been taken from the jury as requested by appellant's counsel.

By the Court.—The judgment is reversed, and the cause remanded with directions to dismiss the same with costs.

SCHAUER, Respondent, vs. BODENHEIMER, Appellant.

September 19—October 8, 1912.

Sales: Deceit: False representations: Concealment: Action to recover price: Questions for jury: Special verdict: Insufficiency: Refusal to submit questions: Waiver of jury trial: Motion for judgment.

1. In an action by the vendee to recover the purchase price paid for a horse, upon the ground of fraud in concealing the fact that the horse was afflicted with a disease which rendered it worthless and in falsely representing that it had another disease and that such disease was of no consequence, it appeared that the horse, when sold, obviously had some disease, but upon the evidence it was a question for the jury whether this materially lessened its value. It was also a question for the jury whether plaintiff relied upon the alleged representation or was induced to purchase by the concealment, but the trial court refused to submit that question; and the jury, disagreeing, left unanswered the question whether defendant, for the purpose of in-

ducing the sale, falsely and deceitfully failed to inform plaintiff that the horse was afflicted with disease. *Held* that, the material issues mentioned not having been determined by the special verdict, a judgment for plaintiff was not warranted.

2. It was prejudicial error in such case to refuse to submit to the jury the question whether plaintiff relied upon the alleged false and fraudulent statement.

3. By moving for judgment upon the verdict and the undisputed evidence a party does not submit his whole case to the court so as to give the court the right to make findings upon material controverted issues upon which the jury failed to agree or which the court had refused to submit to the jury.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, Circuit Judge. *Reversed.*

This is an action in deceit brought to recover the purchase price of a mare and colt sold by defendant, appellant, to the plaintiff, respondent. The right of recovery is based upon alleged fraud in concealment of a material fact and false representation. Before action brought the plaintiff returned or offered to return the property and demanded the purchase money. The purchase was made June 27, 1910, and a written warranty given warranting that the mare had no heaves and was not wind-broken. The charge of false and deceitful representation alleged in the complaint was that the mare had chicken lice, while in fact she had a disease known as mange, of which the plaintiff was ignorant, and which disease rendered her of no value. The answer denies the material allegations of the complaint and denies any warranty or false or deceitful representation, and alleges that defendant refused to give any warranty except the one in writing referred to. The case was submitted to the jury on a special verdict, and after being out twenty-four hours the jury answered all the questions except the sixth, but failed to agreed on the sixth and it was left unanswered. The following is the verdict as returned and filed:

"(1) Did the defendant on or about June 27, 1910, sell to the plaintiff the mare and colt in question for $280? *A.* (by the court). Yes.

"(2) Was said mare at the time of said sale afflicted with the disease called mange? *A.* No.

"(3) If your answer to the second question should be 'No,' then answer this: Was said mare at the time of said sale afflicted with a disease known as an eczematous condition resulting from mange? *A.* Yes.

"(4) If you should answer the second question or the third question 'Yes,' then answer this: Did the defendant know that said mare was so afflicted with said disease at the time of said sale? *A.* Yes.

"(5) If you should answer the fourth question and answer it 'Yes,' then answer this: Did the plaintiff know at the time he purchased said mare that she was afflicted with said disease? *A.* No.

"(6) If you should answer either the second or third question and the fourth question 'Yes,' then answer this: Did the defendant, for the purpose of inducing the sale, falsely and deceitfully fail to inform the plaintiff that said mare was afflicted with said disease? *A.* ——."

After this verdict was returned the court discharged the jury. This was on December 9, 1911. Afterwards the case was noticed by the plaintiff for trial at the March, 1912, term and again placed upon the calendar, but before it was reached the defendant filed an affidavit of prejudice. The court held the case and called in another judge to try it. Before the time set for trial the defendant moved for judgment upon the verdict as returned, upon the minutes of the court, the uncontradicted evidence, and the entire record of said action, which motion was denied. Counsel for defendant also moved for a new trial upon several grounds, and among others because the verdict was contrary to law, and because it did not cover all the material issues in the action and was insufficient, and because there was a mistrial, which motion was also denied. Judgment was ordered for the plaintiff, from which this appeal was taken.

For the appellant there was a brief by *Sheridan, Evans & Merrill,* and oral argument by *P. Sheridan.*

For the respondent there was a brief by *Martin, Martin & Martin,* and oral argument by *J. F. Martin.*

KERWIN, J. As appears from the statement of facts the jury failed to agree upon the sixth question of the special verdict, as to whether the defendant, for the purpose of inducing the sale, falsely and deceitfully failed to inform the plaintiff that the mare was afflicted with disease. It also appears from the record that defendant's counsel requested that the following question be submitted to the jury: "Did the plaintiff rely upon such false and fraudulent statement and was he deceived thereby," which request was denied.

Thus it appears that the issues raised by the sixth question, unanswered, and the request refused, were not passed upon by the jury. The complaint alleges that the mare had mange, which disease rendered her of no value; that, for the purpose of inducing the plaintiff to purchase, the defendant falsely and deceitfully represented that the mare had chicken lice and that such trouble was of little or no consequence; that plaintiff had never heard of or knew anything about either of the diseases known as chicken lice or mange, and relied wholly upon the statement of defendant concerning the disease of the mare.

The evidence tends to show that the mare and colt at the time of sale to plaintiff, if the mare were sound and without blemish, were worth $350, and that the defendant did not represent the mare as sound, and refused to give any warranty except a written warranty to the effect that the mare had no heaves and was not wind-broken.

The main controversy on the trial was whether the mare had mange, and the jury found that she had not, but had eczematous condition resulting from mange, and that this condition was evidenced by bare spots on the neck where the hair had come off or had been rubbed off and the thick and corrugated condition of the skin at the affected places. This con-

dition, or a somewhat similar condition, had existed for two or three years before the sale to plaintiff, except that the extent of the surface affected and size of the bare spots varied.

It also appears from the evidence that the plaintiff kept the mare over five months before offering to return her; that defendant bought the mare from one Schuster about a month before he sold her to plaintiff; that at the time he bought her she was worth $230; that the colt was worth $50. There is no direct evidence as to the damage caused by the eczematous condition, or how much, if at all, it reduced the value of the mare, or whether it was more injurious than the affliction of chicken lice. On the contrary the evidence is that when defendant bought the mare from Schuster she was worth $230, and there is no evidence that she was worth less when sold to plaintiff, and there is no dispute that the colt was worth $50. There is evidence that the mare was in good condition when sold to plaintiff, ran in the pasture with her colt and other horses, and that the other horses showed no signs of infection; that Schuster bought her in 1908 and owned her a little over two years; that she had some bare spots on her neck when he bought her, but the spots did not bother her when he had her; that he worked her double nearly every day. The spots remained about the same as when Schuster had her. Now upon the evidence it is very clear that the jury would be warranted in finding that the alleged concealment or misrepresentation caused no damage to the plaintiff, because it was not a misrepresentation or concealment of a material fact which was a substantial part of the consideration of the contract.

The learned trial court seems to have decided the case upon the ground that the defendant concealed or misrepresented a material fact which was known to him but not known to the plaintiff. It is not easy to see how an affliction which was so patent that any one with his eyes open could see it was a latent defect. Of course it is true, as the evidence tends to show, that it was not easy to see just what the affliction was, whether

mange or eczematous condition resulting from mange, or chicken lice, and in that regard it may be said to be a latent defect. But in any event upon the evidence produced it was for the jury to say whether the affliction went to the substance of the consideration of the contract. The learned trial judge below in his opinion relies upon *Dowling v. Lawrence,* 58 Wis. 282, 16 N. W. 552; *Mannel v. Shafer,* 135 Wis. 241, 115 N. W. 801; and *Hoe v. Sanborn,* 21 N. Y. 552.

In *Dowling v. Lawrence, supra,* the court states the law on this point as follows: "Whenever one person misrepresents or conceals a material fact,—that is, a fact which is substantially the consideration for the contract, and which is peculiarly within his own knowledge,—such transaction will be void on the ground of fraud."

In *Mannel v. Shafer, supra,* it was found that the false and fraudulent representations, in substance, were that the land in question contained between 2,500 and 3,000 cords of standing timber, and that the standing timber did not in fact exceed 337 cords, and it was held that the parties were so situated in relation to the subject under consideration that the defendant was called upon to communicate to the plaintiff the true facts, and failure to do so was at his peril.

In *Hoe v. Sanborn, supra,* the articles sold, viz. circular saws, were manufactured by the vendor and had a latent defect which rendered them worthless, upon discovery of which they were immediately returned.

It will be seen that in all these cases the concealed fact was substantially the consideration for the contract. The special verdict in this case did not determine all the material issues, not only because the sixth question was not answered, but because the court refused to submit the question requested, whether the plaintiff relied upon the representation as to chicken lice or was induced to purchase by the concealment. The case made was peculiarly one which required the submission of such a question. Clearly, the evidence was not suffi-

cient to warrant the court in saying as matter of law that the plaintiff relied upon the concealment or misrepresentation. The evidence of some disease, chicken lice, mange, or eczematous condition resulting from mange, was patent. The plaintiff says in his complaint that he "had never heard of nor knew anything about either of the diseases known as chicken lice or mange." This being so, he could not well have known which was the more damaging to the mare, and since he bought upon the representation that the affliction was chicken lice, a disease which he did not know was less damaging than mange, he might well have bought if the representation had been that the mare had mange or eczematous condition. It is clear from the record that whether he relied upon the representation, or whether the concealment induced the purchase, was for the jury. If he did not rely upon the representation or was not induced to purchase by the concealment, he cannot recover in this action. *Smith v. Reed,* 141 Wis. 483, 124 N. W. 489, and cases cited; *Fowler v. McCann,* 86 Wis. 427, 56 N. W. 1085; *Puffer v. Welch,* 144 Wis. 506, 128 N. W. 895; *Field v. Siegel,* 99 Wis. 605, 75 N. W. 397; 9 Cyc. 427; *Francois v. Cady L. Co.* 149 Wis. 115, 135 N. W. 484.

It was prejudicial error to refuse the request to submit to the jury the question whether the plaintiff relied upon the alleged false and fraudulent statement. *Sherman v. Menominee River L. Co.* 77 Wis. 14, 45 N. W. 1079; *Hildman v. Phillips,* 106 Wis. 611, 82 N. W. 566; *Kruck v. Wilbur L. Co.* 148 Wis. 76, 133 N. W. 1117; *Habhegger v. King,* 149 Wis. 1, 135 N. W. 166.

It is argued by respondent that the appellant, in moving for judgment upon the verdict and the undisputed evidence, submitted his whole case to the court, as well upon the facts as upon the law, therefore the court had the right to make findings upon material issues not covered by the questions answered. This is not the rule in this state. *Nat. C. R. Co. v. Bonneville,* 119 Wis. 222, 96 N. W. 558; *Thompson v. Brennan,* 104 Wis. 564, 80 N. W. 947; *Habhegger v. King, supra.*

We are cited by counsel for respondent to the following authorities: *Farrell v. Hennesy,* 21 Wis. 632; *Hinton v. Coleman,* 76 Wis. 221, 45 N. W. 26; and *Charles Baumbach Co. v. Hobkirk,* 104 Wis. 488, 80 N. W. 740. But we cannot see that these cases support the respondent's contention here.

Other errors are assigned and discussed in appellant's brief but we need not consider them, since the judgment must be reversed on account of the errors already treated.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

KINDINGER, Respondent, vs. BEHNKE and others, Appellants.

September 19—October 8, 1912.

Garnishment: When may issue: Intervening claimant: Traverse of answers: Burden of proof: Pleading: Action, tort or contract? Breach of covenants of lease.

1. Where garnishees severally answer, admitting indebtedness to the principal defendant but alleging that a third person claims to be the owner of the demands, plaintiff need not traverse such answers if satisfied with the amounts admitted.
2. Nor where the third person intervenes and by an answer claims to own the demands against the garnishees is a traverse of such answer necessary, since the affirmative matter therein not constituting a counterclaim is in issue by force of sec. 2667, Stats. (1898).
3. In any event, when an intervener comes in either as plaintiff or defendant for the purpose of making a claim to some property or fund adverse to the other parties or either of them, the burden of proof is upon him to establish such claim.
4. The complaint in this case, claiming damages on account of destruction, alteration, and injuries to sawmill property leased by plaintiff to defendants, is *held* to be based upon alleged breach of the covenants of the lease and to state a cause of action on contract, not one sounding in tort.
5. Sec. 2753, Stats. (1898), providing for garnishment "in any action to recover damages founded upon contract," is not limited to actions for liquidated damages.

APPEAL from a judgment of the circuit court for Price county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The appeal is from a judgment in a garnishment action.

The plaintiff began an action against *W. A. Behnke* and *A. L. Behnke,* copartners, setting forth a first count or cause of action for the reformation of a lease executed by plaintiff to said defendants in which the leased property was by mistake incorrectly described. For a second cause of action averring that the plaintiff was the owner of certain real estate consisting of a piece of land, a sawmill, and machinery and tools, which he leased to said defendants, and that in and by said lease said defendants covenanted and agreed that at the expiration of their term they would surrender the premises to the plaintiff in as good condition as the same then were, necessary wear and tear and destruction by the elements excepted. Contrary to the terms, conditions, and covenants of their lease defendants utterly failed and neglected to surrender said premises to plaintiff in as good condition as they were at the time of said lease, setting forth such condition in great detail. That defendants made various changes and alterations in said leased premises without plaintiff's consent or approval, and that the boiler on the leased premises exploded through the negligent and careless handling thereof by defendants, by reason whereof the foundation and casing whereon the same stood was completely cracked and demolished, damaged, etc., the engine room blown down, certain castings broken, etc. After said explosion said defendants insufficiently repaired. During their term defendants operated the sawmill in a careless and reckless manner, caused considerable breakage and destruction, suffered and permitted the premises to become littered and clogged up with sawdust, and at the expiration of their term, contrary to their agreement and covenant, left, vacated, and surrendered said premises with such alterations, changes, demolitions, displacements, damages, and injuries as aforesaid, and refused to repair the same or restore the same

to the condition the premises were in when the lease was made. By reason of these things the plaintiff was greatly damaged, and it will require the expenditure of $775 to restore the premises to as good condition as the same were in when the lease was made, natural wear and destruction by the elements excepted. In this count there is also a claim for $85 for tools, etc., negligently lost or wrongfully appropriated by defendants to their own use, etc. For a third and separate cause of action the plaintiff alleged that when defendants entered under their lease plaintiff had on hand at the mill certain hemlock slabs suitable for fuel which the defendants desired to use for that purpose, and offered plaintiff in exchange thirty cords of hardwood slabs. Defendants used the hemlock slabs, notwithstanding demand refused to deliver the hardwood slabs to plaintiff, damage in the sum of $41.63. The defendants by answer admitted the making of the lease and their entry thereunder, the receipt of the slabs, which they claimed had been paid for, and also interposed a general denial and a counterclaim. The case was tried to a jury and a special verdict returned, upon which judgment was rendered against the defendants in the principal action for damages and costs. This judgment is not appealed from.

For the appellants there was a brief by *W. K. Parkinson,* attorney for defendants, and *J. E. McMullen,* of counsel, appearing for *Albert Behnke,* claimant, and a supplemental brief and oral argument by *Mr. McMullen.*

For the respondent the cause was submitted on the brief of *Holland & Lovett.*

TIMLIN, J. While the action above mentioned was pending the plaintiff therein, respondent here, upon proper affidavits caused summons in garnishment to be issued against several persons alleged to be indebted, etc., to the defendants. These persons each answered admitting an indebtedness to the defendants *W. A. Behnke* and *A. L. Behnke,* but alleging fur-

ther that one *Albert Behnke* claimed to be the owner of the demands against them. By due proceedings thereafter *Albert Behnke* was allowed to intervene as such claimant and served what he called an answer, claiming to own the demands. The plaintiff did not traverse the answers of either of the garnishees or that of *Albert Behnke.* After judgment in the principal action the garnishee action came on for trial. Plaintiff offered in evidence the judgment roll in the principal cause, also other evidence. The intervener, *Albert Behnke,* offered no evidence, but left his claim of title to the demands against the garnishees entirely unsupported, and judgment went in favor of the plaintiff against each garnishee for the amount admitted in the answer of the latter, and from this judgment the three *Behnkes* appeal.

There was no occasion for traversing the several answers of the garnishees if plaintiff was satisfied with the amount which each admitted he owed to the principal defendant, and we must assume plaintiff was satisfied. Neither was there any necessity for a traverse of the answer of the intervener. If he chose to take the position of a defendant and answer the affidavits in garnishment, the affirmative matter in his answer not constituting a counterclaim was at issue by force of statute. Sec. 2667, Stats. (1898). In any event, when an intervener comes in, either as plaintiff or defendant, for the purpose of making a claim to some property or fund adverse to the other parties or either of them, he must make good his claim. The burden of proof is, under such circumstances and upon this point, on him. So there is nothing to impeach the judgment appealed from upon its merits. But it is contended that the principal action was upon a claim sounding in tort and that upon such demand no garnishment is authorized. However, it appears quite clearly to us that the principal action was one for damages caused by breach of the covenants of a lease. The subject of the second cause of action is thus introduced, and the long detailed description of acts negli-

gently done, etc., is intended to show that the dilapidation was not the result of ordinary wear and tear. The complaint is awkward and unscientific, but it is enough. *W. H. Kiblinger Co. v. Sauk Bank,* 131 Wis. 595, 597, 111 N. W. 709; *Boehrer v. Juergens & A. Co.* 133 Wis. 426, 113 N. W. 655; *Johnston v. Charles Abresch Co.* 123 Wis. 130, 101 N. W. 395.

Being "an action to recover damages founded upon contract" (sec. 2753, Stats. 1898), the garnishment was properly issued. The statute does not say "liquidated damages," but uses general words, and it would be an extraordinary and unsound construction which would undertake to limit the word "damages" by interpolation of the adjective "liquidated." *Fire Dept. v. Tuttle,* 50 Wis. 552, 7 N. W. 549; *First Nat. Bank v. Van Vooris,* 6 S. Dak. 548, 62 N. W. 378.

Several minor questions relating to the taxation of costs and its effect as recognition of the principal action as one sounding in tort are argued, but with the judgment in the principal action a verity, the garnishees admitting the indebtedness to the principal defendants, and the intervener offering no evidence to uphold his claim to the demands against the garnishees, and the complaint in the principal action consisting of one cause of action in equity for reformation of the lease and two others for damages for breach of its covenants, it is unnecessary to prolong the discussion, for the judgment in garnishment could not, under the circumstances, be reversed or modified.

By the Court.—Judgment affirmed.

WASHBURN LAND COMPANY, Respondent, vs. SANBORN, Appellant.

September 19—October 8, 1912.

Tax titles: Redemption: Action to bar former owners: Moneys paid in lieu of deposit: Consideration: Recovery back: Limitation of actions: Champerty.

1. A tax lien which has ripened into a tax deed is not subject to redemption.
2. Pending an action under sec. 1197, Stats. (1898), by grantees in a tax deed to bar the former owners, one to whom the defendants had deeded the land paid to plaintiffs' attorney a sum of money to cover the taxes, interest, charges, and costs of suit, for the purpose of wiping out the tax lien and upon the understanding that said attorney would try to procure from plaintiffs a quitclaim deed to the payor. Plaintiffs refused to give the quitclaim deed, and did not accept the payment. Thereafter the money was treated as equivalent to a deposit in court pursuant to sec. 1200, Stats. (1898). Final judgment went in favor of plaintiffs. *Held*, that the payor had received no consideration for the money so paid to plaintiffs' attorney, and might recover it back.
3. The money so paid to plaintiffs' attorney having been held as a deposit for a specific purpose during the pendency of the action, the relation of debtor and creditor did not then exist between said attorney and the payor, and the time within which an action might be brought to recover the money did not begin to run until its repayment was thereafter demanded.
4. A champertous agreement under which the former owners of the land had transferred it to the payor of the money in question did not affect the agreement under which the money was paid or preclude its recovery.

APPEAL from a judgment of the circuit court for Ashland county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

The issues in this case can perhaps be best understood by stating in condensed form the findings of fact and conclusions of law made by the court. As matters of fact the court found:

"(1) That on the 30th day of October, 1899, A. W. McLeod deposited with *A. W. Sanborn,* then a member of the firm of

Cate, Sanborn, Lamoreux & Park, attorneys at law at Ashland, Wisconsin, the sum of eight hundred six and 15/100 (806.15) dollars for J. W. and D. W. Emerson, the same being the amount of taxes on lands hereinbefore described with interest, as required by law, and the costs of suit in an action of J. W. Emerson and D. W. Emerson vs. A. B. McDonnell and Thomas Irvine, to foreclose tax deeds on said lands which had been deeded by said McDonnell and Irvine to said McLeod.

"(2) That A. W. McLeod requested said *A. W. Sanborn* to procure a quitclaim deed from the said Emersons to him, it having been conceded that the tax deeds under which they held were void.

"(3) That said Emersons refused to deliver such deed.

"(4) That the said *A. W. Sanborn,* after receiving said eight hundred six and 15/100 (806.15) dollars from the said A. W. McLeod, informed the said Emersons of the fact of said payment and they thereupon directed him to retain out of said sum, as attorneys' fees due from them to Cate, Sanborn, Lamoreux & Park, ninety-one dollars and 50/100 (91.50), and ratified the receiving of all of said money paid to the said Emersons through their said counsel, the said *A. W. Sanborn,* by the said A. W. McLeod.

"(5) That the money deposited and paid to the said *A. W. Sanborn* at the time of the depositing and payment thereof was the money of the said A. W. McLeod.

"(6) That the title of the said J. W. Emerson and D. W. Emerson to the lands in controversy was sustained in their action against A. B. McDonnell and Thomas Irvine, and that consequently the said A. W. McLeod received nothing for the money so deposited and paid to the said *A. W. Sanborn.*

"(7) That subsequently to the depositing and payment of said money by the said A. W. McLeod to the said *A. W. Sanborn* and the application of said sum of ninety-one and 50/100 (91.50) dollars as attorneys' fees due from the said Emersons to the firm of Cate, Sanborn, Lamoreux & Park, to wit, on July 7, 1903, the said Emersons made demand on the firm of Cate, Sanborn, Lamoreux & Park for a statement of account of the eight hundred six and 15/100 (806.15) dollars so deposited by said A. W. McLeod, and demanded that said sum be paid to them, less such sum as may be properly due said attorneys for services and disbursements in said action; that the said

money was not paid over to said Emersons pursuant to this demand.

"(8) That thereafter on the 30th day of December, 1903, the said Emersons made demand in writing on *A. W. Sanborn* that he return to A. W. McLeod the sum of $806.15 deposited by McLeod October 30, 1899.

"(9) That said sum was not returned to McLeod or plaintiff and that said *A. W. Sanborn* still retains the same and the whole thereof.

"(10) That said Emersons tendered to said Cate, Sanborn, Lamoreux & Park ninety-one and 50/100 (91.50) dollars, the amount due them for services in said action.

"(11) That the firm of Cate, Sanborn, Lamoreux & Park had an agreement with the said Emersons to perfect the title at five (5) dollars per forty."

(12) Gives a description of the lands involved in the suit of the Emersons vs. McDonnell and Irvine.

"(13) That on or before September 1, 1906, the said A. W. McLeod made demand on the defendant, *A. W. Sanborn,* for the return of said money.

"(14) That prior to the commencement of this action the said claim of A. W. McLeod for said sum of $806.15 was sold and assigned to the plaintiff herein, *Washburn Land Company.*"

As conclusions of law the court found:

"(1) That said *A. W. Sanborn* is entitled to deduct from said $806.15 the sum of $91.50, the same being due the firm of Cate, Sanborn, Lamoreux & Park for services and disbursements rendered to and for J. W. and D. W. Emerson in the said action against A. B. McDonnell and Thomas Irvine.

"(2) That the balance, to wit, the sum of $714.65, in said *Sanborn's* hands, belongs to this plaintiff herein, and it is entitled to recover the same with interest at six per cent. from September 1, 1906.

"(3) That the plaintiff have its costs and disbursements herein."

For the appellant there was a brief by *Allan T. Pray* and *Albert S. Larson,* and oral argument by *Mr. Larson.*

For the respondent the cause was submitted on the brief of *John Garvin.*

BARNES, J. There was nothing unusual about the original transaction between attorneys *Sanborn* and McLeod. The former had instituted an action to bar the former owners of certain lands under sec. 1197, Stats. (1898), and succeeding sections. The plaintiffs held a single tax deed on this land on which the three-year statute of limitations had not run, and some tax certificates which were not old enough to be deedable. The defendants had the right under the statute to set up by way of defense certain defects or irregularities which would avoid the tax deed, but as a condition of making such defenses they were obliged to deposit with the clerk of the court at the time of filing their answer, for the use of the plaintiffs, the sum for which the parcels of land were sold, with interest thereon, together with subsequent taxes paid by the plaintiffs, with interest, and allege in the answer that they had made such deposit and were willing to pay such portion of the costs and disbursements of the action as were adjudged to be just and reasonable, in case the plaintiffs elected to receive the deposit so made. After such proceedings were had, the plaintiffs might elect to receive the deposit, and as a condition of accepting the money they would be obliged to release to the defendants all their right, title, and interest in the lands. If the plaintiffs failed to accept the offer so made and the defendants prevailed on the trial, the latter were entitled to recover their costs incurred after the offer was made.

It is quite apparent from the record in this case that *Mr. Sanborn* was satisfied that the tax deed under which his clients claimed would be set aside by the court, because it was void for various reasons. *Mr. Sanborn* so stated in an affidavit which he made. This being so, and Mr. McLeod having appeared in the action as attorney for the defendants, and having expressed a willingness to pay what the statute obligated him to pay, there was apparently no controversy left. It was no doubt considered by both attorneys that the easiest and cheapest way to dispose of the case was to procure a quitclaim deed from the Emersons and pay to their attorney the money

to which they were entitled and close the matter up without further court proceedings. The arrangement fell through because the Emersons refused to execute the deed and repudiated the authority of their attorney to dispose of their suit in that way. It is true that *Mr. Sanborn* made no positive agreement to procure the deed, but he did promise to ask his clients for it, and did so. As the matter then stood, the tax deed under which plaintiffs claimed could only be wiped out by a judgment of court, and the defendants interposed an answer in the case. This answer did not allege the payment of any money into court for the use of the plaintiffs, but in lieu of such averment did allege that there had been paid to the plaintiffs the sum of $806.15 to cover taxes, interest, and charges, together with the costs of the action. This averment related to the sum paid *Sanborn*. On March 14, 1903, judgment was entered in defendants' favor on the issue so joined. Later this judgment was set aside because of an alleged champertous agreement between the defendants and their attorney, and because of such agreement judgment was rendered in plaintiffs' favor in accordance with the demand of the complaint. An appeal was taken from this judgment to this court, and it was affirmed in June, 1906 (129 Wis. 67, 107 N. W. 1037). Thereupon McLeod demanded the return of his money, which was refused.

In July, 1903, the Emersons demanded of *Sanborn* that he turn over to them the amount of money paid him by McLeod, less attorney's fees, computed according to a contract alleged to exist between the parties. This request was refused, and of the amount received there was credited to Emerson Brothers on account the sum of $717, and the balance retained as the taxable costs and disbursements. Thereafter the Emersons apparently discovered the existence of the alleged champertous agreement, and on January 2, 1904, served on the defendant a notice to the effect that they had deposited in a designated bank, subject to his order, the sum of $91.50 in pay-

ment of his fees in the pending suit, and demanded that he return to McLeod the sum of $806.15 received from the latter. This demand was not complied with.

Two errors are assigned and argued: (1) the trial court was wrong in finding that McLeod received no consideration for the money paid defendant; and (2) it was error not to hold that the plaintiff's claim was barred by the statute of limitations.

The argument urged in support of the first assignment of error is that the money was paid as a redemption of the tax liens held by Emerson Brothers and operated to redeem the land from such liens. It is obvious that these tax liens were not redeemed. A tax lien which has ripened into a tax deed is not subject to redemption. If the Emersons had accepted this money with full knowledge of the facts they might and probably would be estopped from asserting title under their deed. But the deed would remain an apparent lien or cloud on the title until it was set aside by a judgment of court or until the Emersons conveyed to the defendants in the then pending action. It is clear that McLeod paid his money for the purpose of wiping out the tax liens and claims of the Emersons and that they were not wiped out and that he received no consideration for his money. While *Mr. Sanborn* did not agree that he would procure a deed from his clients, it was either expressly or tacitly understood that he would endeavor to do so, and that if he did not succeed in getting the deed McLeod might interpose an answer in the case and treat the money paid *Sanborn* as being tantamount to a payment into court as required by statute, and it was so treated in the subsequent trial of the case.

In support of the second error argued it is urged that in any event the relation of debtor and creditor existed between *Sanborn* and McLeod from the time the check was deposited in October, 1899, and that inasmuch as the action was not commenced until April, 1908, it was barred by the six-years stat-

ute of limitations. In this connection it was argued that *Sanborn* was not a bailee because there was no understanding that the identical thing deposited should be returned.

The relation of debtor and creditor did not exist between these parties so long as the litigation continued. The check was left with *Sanborn* as a deposit for a specific purpose, and until the case was finally determined it could not be withdrawn without loss of the right to defend the action. *Sanborn* really was in the position of trustee whose duty it was to pay the money to his former clients if they were beaten in the suit, or to McLeod if he was unsuccessful. So long as the litigation was in progress neither of the parties could withdraw the money without jeopardizing their rights, and it was *Sanborn's* duty to pay it to the party finally entitled thereto, and the statute of limitations did not begin to run until payment was demanded. It would hardly be contended that if this deposit had been made with the clerk of the court, as the statute requires, that officer could at the close of the litigation, regardless of any statute requiring him to pay the money, refuse to pay it over because it had been on deposit for more than six years, and there is little difference between the two situations.

The cases of *Shoemaker v. Hinze,* 53 Wis. 116, 10 N. W. 86, and *Curran v. Witter,* 68 Wis. 16, 31 N. W. 705, relied on by the appellant, have no application to this case. In each of those the relation of debtor and creditor existed between the depositor and the depositee as soon as the deposit was made, and action might be commenced at once to recover the amount so deposited. In the case before us a sum of money was deposited for the specific purpose of being paid to third parties on their complying with a prescribed condition. The plaintiffs could not accept and McLeod could not withdraw the deposit without waiving their rights to litigate the issues in the case, and it is perfectly plain that McLeod had no right of action against *Sanborn* until after making a demand for the return of the money. Sec. 4222, Stats. (1898), commences to run only after the cause of action has accrued. There was

no cause of action until *Sanborn* was guilty of some default. *McArthur v. Moffet,* 143 Wis. 564, 571, 128 N. W. 445; *Comm. v. McGowan,* 4 Bibb (Ky.) 62; *Cooper v. Cooper,* 61 Miss. 676, 696. There was no denial of plaintiffs' right on *Sanborn's* part until he refused to comply with the demand made upon him.

It is insisted that plaintiff cannot recover because of the champertous agreement between McLeod and McDonnell and Irvine. We do not see how this agreement affected the contract between McLeod and the defendant. If the Emersons had themselves accepted the money and insisted on retaining it while they were trying to prevail on the champerty issue, we apprehend the court would make short shrift of that issue. As a matter of fact they did not attempt the impossible feat of keeping their cake and eating it at the same time. They directed the return of the money when the champerty issue was raised. We find no error in the record.

By the Court.—Judgment affirmed.

KRUEGER, Respondent, vs. LAKE TRADING COMPANY, Appellant.

September 20—October 8, 1912.

Sales: Place of delivery: Express contract: Custom: Evidence: Instructions to jury: Appeal: Harmless errors.

1. The question being whether railroad ties, sold under an oral contract and afterwards burned, had been delivered to the vendee, and it being undisputed that the place of delivery was expressly provided for in the contract, although the parties differed as to what that place was, evidence as to a custom in respect to the place of delivery of such forest products was not competent, and no instruction relative thereto should have been given to the jury.
2. An instruction in such case that the jury might consider the custom of which the vendee had given evidence if they found it existed and was known to the vendor and *if there was no express agreement,* was not, in any event, harmful to the vendee.

Appeal from a judgment of the circuit court for Taylor county: John K. Parish, Circuit Judge. *Affirmed.*

Action to recover the balance of the purchase price of railroad ties sold under an oral contract. Plaintiff claimed the agreement was that the ties were to be delivered on the railroad track of a certain logging road running into Rib Lake. The ties were delivered upon said railroad track, but before they were loaded on cars and shipped they were burned. The defendant alleged that the contract was that the ties were to be delivered to it at Rib Lake, loaded on cars, and that in the business of buying and selling hemlock, tan bark, railroad ties, and pulp wood at the village of Rib Lake and vicinity, it was during all the times mentioned in plaintiff's complaint the general custom, practice, and understanding of all people engaged in said business that such forest products be delivered by the seller by loading the same on railroad cars and having such loaded cars consigned to it at Rib Lake.

The jury returned a general verdict for the plaintiff, and from a judgment entered thereon the defendant appealed.

The cause was submitted for the appellant on the brief of *Schweppe & Urquhart,* and for the respondent on that of *Barry & Barry.*

Vinje, J. It is claimed the verdict is not supported by the evidence. Plaintiff testified that it was agreed the place of the delivery of the ties should be on the railroad track. The defendant's agent who bought them testified the agreement was that they should be delivered loaded on cars at Rib Lake. There was no other direct evidence as to the terms of the contract with reference to the place of delivery. A careful perusal of the evidence shows there are as persuasive attendant circumstances corroborating plaintiff's claim as there are those that lend color to the claim of the defendant. The verdict of the jury, therefore, cannot be set aside as against, or not supported by, the evidence. It was peculiarly within the prov-

ince of the jury to determine whose evidence was the more credible.

On the subject of custom the court instructed the jury as follows:

"In regard to the evidence tending to prove custom, if you find that said custom existed, and that the plaintiff knew such custom, then you may consider that as a circumstance tending to prove that the parties contracted with reference to this alleged custom as to the delivery of said ties, *if there were no express agreement.*"

Defendant contends that this instruction was erroneous, inasmuch as the custom, being a general one, would be presumed to have entered into the contract, and that one may be bound thereby although ignorant of it, unless the other party be shown to have knowledge of his ignorance. Under the uncontradicted testimony in this case the question of place of delivery was provided for in the contract between the parties. It was either on the railroad track, as plaintiff testified, or at Rib Lake on board cars, as defendant claimed. That being so, evidence as to custom was erroneously received and should not have been considered by the jury, nor should any instruction relative thereto have been given. *Kosloski v. Kelly,* 122 Wis. 665, 100 N. W. 1037.

It is doubtful if the instruction of the court can be said to have submitted the question of custom to the jury, inasmuch as they were told they should consider the subject of custom only if there was no express agreement as to place of delivery. Since both parties assert that there was an express agreement relative thereto it is difficult to see what is left of the instruction. But if it be deemed to have been considered by the jury, it was, to the extent that it was considered, beneficial and not harmful to the defendant. Its claim was, through such instruction, given some support when it was entitled to none.

By the Court.—Judgment affirmed.

SWANBY, Administratrix, Respondent, vs. NORTHERN STATE BANK, imp., Appellant.

September 20—October 8, 1912.

Bills and notes: Proof of ownership: Possession: Mortgages: Foreclosure: Payment of money into court: Interpleader: Form of judgment: Equity: Determining whole controversy: Amendment of pleading.

1. Mere naked possession of negotiable paper payable to order and not indorsed does not establish title thereto or prove or tend to prove a transfer to such possessor.
2. Where, in an action to foreclose a mortgage, defendant paid the amount due into court, and a bank which had possession of and claimed to own the notes and mortgage was interpleaded as a defendant, and the mortgage was discharged by agreement, the action ceased to be a foreclosure action under the statute and became one of interpleader, involving only the question of ownership of the securities. The statute (sec. 3162, Stats. 1898) prescribing the form of judgment in foreclosure actions was therefore inapplicable.
3. It appearing in such case from the pleadings that instalments of the mortgage debt had been paid by the mortgagors to the bank, and it being found that plaintiff, not the bank, was the owner of the notes and mortgage, the judgment properly disposed of the whole controversy by awarding the plaintiff a recovery, as against the bank, not only of the money paid into court, but also of the amount of the payments previously made to the bank.
4. In such a case the trial court should, if necessary, direct the pleadings to be so amended as to sustain and justify the judgment; and if that court fails to do so the supreme court, on appeal from the judgment, will treat the pleading as having been properly amended.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Affirmed.*

This was originally an action brought against Marion and wife to foreclose a real-estate mortgage given by them October 6, 1906, to O. P. Swanby, plaintiff's intestate, to secure payment of five negotiable notes of $450 each, payable to the

order of Swanby, one falling due on January 1, 1908, and one on January 1st of each year thereafter until January 1, 1912. Judgment of foreclosure was demanded on account of the notes falling due January 1, 1910, 1911, and 1912, with interest. It appears that Swanby was cashier of the appellant bank when the notes and mortgage were given, that he died suddenly February 18, 1908, owing the bank $600 upon a note, as well as a sum of more than $5,000 embezzled by him while he was cashier, and that he kept his papers relating to his private real-estate business in the vaults of the bank. The Marions answered, admitting the execution of the mortgage and that the notes declared upon in the complaint were unpaid, but set up further that the *Northern State Bank* had possession of the notes and mortgage, claiming to own them, and praying that they be permitted to pay into court the moneys due and that the bank be interpleaded as a defendant. An order of interpleader was made, and an amended complaint was served containing practically the same allegations as the original complaint, together with an allegation setting forth the interpleader proceedings and denying knowledge as to the claim of the bank. The bank answered, setting up the indebtedness of Swanby, and alleging that the notes and mortgage were pledged and delivered to the bank by Swanby, October 18, 1907, as collateral security for any sums due or which might become due from him to the bank. The answer further alleged that Marion paid the first two notes and interest to the bank October 10, 1908, and that the bank applied the same to extinguish the $600 note of Swanby and the balance upon the indebtedness arising from the embezzlement. The answer prayed judgment establishing its lien on the notes and mortgage and foreclosing the mortgage in its favor.

At the time of the trial the defendant Marion paid into court the amount of the last three notes and the mortgage was discharged by agreement of the parties, while the issues between the plaintiff and the bank were tried by the court.

There was no serious dispute in the evidence. It appeared that the notes and mortgage were in possession of the bank unindorsed and unassigned at the time of the trial and had been there since about the time of their execution, and were kept with the collateral securities held by the bank; that the first two of the notes were paid to the bank by Marion October 10, 1908. Evidence was offered to the effect that Swanby delivered them to the president of the bank, but the evidence was rejected on the ground that it tended to prove a transaction with a deceased person from whom plaintiff derived her title. At the opening of the trial an amendment to the complaint was allowed, alleging that the defendant had breached the mortgage by failing to pay the note falling due January 1, 1908, as well as by failing to pay the instalments falling due thereafter. Upon these facts the court found that the plaintiff owned the notes and mortgage in question and was entitled to receive the money paid into court by Marion and recover from the bank the two instalments received by it from Marion. Judgment being entered in accordance with this finding, the bank appeals.

John Walsh, for the appellant.

For the respondent there was a brief by *A. W. McLeod,* attorney, and *John N. Berg & Adolph E. L. Johnson,* of counsel, and oral argument by *Mr. Berg.*

Winslow, C. J. Upon the principal question in this case, namely, the question whether the plaintiff or the bank was shown by the evidence to be the owner of the mortgage, there is no serious doubt. The notes were negotiable, payable to the order of Swanby, and had never been (so far as the evidence shows) indorsed, assigned, or transferred either by writing or by parol to the bank or any third person. In the absence of other evidence this proves ownership in Swanby. The possession of the bank was under no agreement of any kind with the payee.

Mere naked possession of negotiable paper payable to order does not prove title. *Andrews v. Powers,* 35 Wis. 644. The same result manifestly follows from the provisions of the negotiable instrument law. By sec. 1676—21, Stats. (Supp. 1906: Laws of 1899, ch. 356), it is provided that the holder of a negotiable instrument may sue thereon in his own name, and by sec. 1675, Id., the holder of a note payable to order is defined as the *payee* or *indorsee* in possession thereof.

True, the payee of such a note may transfer it for value without indorsement, and in such case the transferee not only acquires the transferrer's title, but also the right to have the note indorsed (sec. 1676—19, Stats.), but no such transfer was shown here. Mere naked possession does not prove or tend to prove it.

The second contention made is one of form rather than of substance. It is to the effect that the judgment is erroneous because not in conformity with the statute governing judgments in foreclosure actions, and particularly because it contains a personal judgment against the bank for the recovery of the two instalments paid to it by Marion before the commencement of the action.

It is true that the judgment does not conform to the foreclosure statute. It entirely omits any provisions for the foreclosure of the mortgage or sale of the premises. But all this was for a very good reason. The mortgage had ceased to be a lien upon the premises before judgment was rendered, and hence could not be foreclosed. By the interpleading of the bank and the deposit of the money represented by the mortgage in court the action had practically ceased to be a foreclosure action and had become an equitable action of interpleader in which the two rival claimants to the notes and mortgage were fighting out their respective claims. Sec. 2610, Stats. (1898).

It would be manifestly absurd to hold that when the action has reached this stage the mandatory provisions of the statute

relating to judgments in foreclosure are applicable. The action is no longer an action of foreclosure under the statute, but an action of interpleader, in which there is no question of foreclosure left, but only the question of the title to the proceeds of the mortgage after payment thereof.

With reference to an analogous situation this court said in *Hemenway v. Beecher,* 139 Wis. 399, 121 N. W. 150:

"Sec. 2610, Stats. (1898), relating to the interpleading of additional parties, and sec. 2656*a* of the same Statutes, relating to cross-complaints and proceedings where controversies arise between defendants, are very broad in their terms and were intended to give courts plenary powers not only to call in new parties, but to mould the pleadings and dispose of all branches of a controversy in one action after having obtained jurisdiction of the necessary parties. The idea in both sections is to enable the court to grasp all the issues germane to the main controversy, whether arising between the plaintiff and the defendant, or between defendants, or between a defendant and an outside party, and dispose of them in one and the same action, and thus avoid circuity of action and multiplicity of suits. This purpose should be encouraged rather than discouraged by the courts. It is in line with the idea that courts are formed to decide controversies without unnecessary delay and without undue refinement as to pleading or procedure so long as the parties are before the court and the issues understood."

There was really but one question between the plaintiff and the bank, and that was the question of the ownership of the notes and mortgage. When that question was finally decided in this case it was decided for all time and for all future actions between these parties. If the plaintiff was held to be the owner, she would not only own the fund in court but also be entitled to receive the money which the bank had previously collected from Marion. Why compel her to go out of court by one door and come in by another in order to recover this sum, when the question of liability is no longer open and the only effect of such a proceeding would be to charge the bank with an-

other bill of costs? Such rulings are the kind of rulings which furnish foundation, if foundation there be, for recent complaints as to the efficiency of the courts.

As indicated in the foregoing quotation from the *Hemenway Case,* secs. 2610 and 2656*a,* Stats. (1898), were intended to give the trial court very broad powers, not only in the calling in of parties but in the moulding and adapting of the pleadings so as to finally dispose of all branches of the controversy, and if that was the intention of the legislature it is certainly the duty of the courts to carry it out.

The controversy between the plaintiff and the bank was over the ownership of the notes. The question of the right of the plaintiff to recover the instalments theretofore paid to the bank by Marion was simply a subsidiary branch or detail of the controversy over the ownership, which ought in principle to be disposed of in the one action for the benefit of the bank as well as for the benefit of the plaintiff. It is true that the complaint first served after the order of interpleader contained no allegation with regard to the payment of these instalments to the bank and demanded no judgment for any specific relief thereon. On the trial, however, the complaint was amended by adding an allegation that Marion had failed to pay to the plaintiff the two instalments which the bank in its answer admitted and alleged that it had received. So the fact was before the court both by the pleadings and evidence, and without objection. The trial court was thus fully apprised of the fact that this subsidiary controversy, depending entirely on the decision of the main controversy, existed, and it seems that it was practically its duty, under the general principles laid down in the *Hemenway Case,* to direct the pleadings to be so amended as to sustain and justify the judgment. When such a situation exists this court will, of course, treat the pleadings as properly amended in order to support a judgment which in all other respects is manifestly right.

By the Court.—Judgment affirmed.

JACOB JOHNSON FISH COMPANY, Respondent, vs. HAWLEY, Administrator, Appellant.

September 20—October 8, 1912.

Contracts: Conditional acceptance of offer.

Plaintiff, a company engaged in the fishing business, offered to pay H. $300 for the use of his tugboat for the season. H. replied, by way of a counter offer, "Go for three hundred for thirty days, you pay expenses one way." Plaintiff then wired: "Terms accepted, engage Capt. Garland, writing;" and also wrote to H., inclosing two copies of a lease and saying: "Please sign one copy and return it to us at once so that we may know the matter is settled. . . . We wired you this morning that your terms were accepted and to engage Capt. Garland. And we will write him also and engage his services. We want no other man if we can get him. . . ." H. promptly informed plaintiff that he would not consent to the engagement of Capt. Garland, but plaintiff did not recede in the matter of such engagement until about a week later, at which time H. had leased his boat to another person. *Held*, that plaintiff's acceptance of the counter offer was conditional upon the engagement of the captain named, and that as there had been no assent to such condition no contract was closed.

APPEAL from a judgment of the circuit court for Bayfield county: JOHN K. PARISH, Circuit Judge. *Reversed.*

Action for damages on contract.

Plaintiff applied to defendant's intestate, Batt Hawley, to engage the tug "Tramp" in the fishing industry on Lake Superior for the season, using these words: "If tug 'Tramp' is not engaged will pay $300 for season. Wire me answer please." Mr. Hawley promptly replied: "Tug not engaged. Go for three hundred for thirty days, you pay expenses one way. Wire answer." Plaintiff answered: "Terms accepted, engage Capt. Garland, writing." Also wrote inclosing duplicate forms for leases, and requesting execution thereof and return of one duplicate so that the matters might be regarded as settled, assuring Mr. Hawley that the lessee would pay ex-

penses one way and saying, "We wired you this morning that your terms were accepted and to engage Capt. Garland. And we will write him also and engage his services. We want no other man if we can get him. We expect to want the boat Nov. 15th, and unless we wire you otherwise, you may be here on that date. Please have lease signed before notary public."

Upon Mr. Hawley receiving the papers, he promptly complained by telephone that the terms specified therein were not according to the offer, and the condition, as to hiring Capt. Garland, was objectionable. Plaintiff acknowledged the error as to terms; but, does not appear to have withdrawn the condition, mentioned in the letter, as to hiring Capt. Garland. However, plaintiff followed the telephone communication by a letter, using these words:

"If there is anything about the contract we sent you for your signature that you do not like, draw up one and send it to us at once. A contract is, really, not necessary, as we have your acceptance; but, it is best, in cases of this kind, to have a thorough understanding so there will be no friction later. . . . We are sorry to hear that you do not approve of Capt. Garland as we consider him a good man for the business and we hope that you will decide to forget the past and let him come up with her."

To that reply was promptly made that the tug had been leased to other parties. Plaintiff thereupon hired the tug "Brower" which went out of commission in a few days and then secured the tug "Arthur" for remainder of the season. Because of inferiority of the "Arthur" plaintiff was compelled to confine the fishing operations to a different district than could have been reached by the tug "Tramp." Only fifty tons of fish were secured during the season. The party who used the "Tramp" secured 122½ tons. The net profit on a ton of fish was $8.

At the close of the evidence, a motion in defendant's behalf for a directed verdict was denied, upon the ground that the response by Mr. Hawley to plaintiff's telegram, contained the

words, "Close contract," "Terms accepted;" that the reference to Capt. Garland was merely advisory, and that the letter which followed did not change the matter. The cause was submitted to the jury with directions to find for the plaintiff. The jury were informed that they only had to deal with the subject of damages; but, that was followed by instructions, practically taking such subject from them. They were told that there was a contract, a breach of it by Mr. Hawley, and that plaintiff was entitled to such damages as it suffered "that were the immediate and direct result of the breach," and that the exact amount was rendered certain by the undisputed proof of the difference between the amount of fish obtained by use of the "Tramp" and the amount plaintiff obtained by use of the "Brower" and "Arthur" and the net profit per ton of fish. This language was used: "The evidence as to plaintiff's damages is proven and not disputed by any evidence. It rests upon proven facts. . . . There is no element of uncertainty left."

The jury returned a verdict for $250, and judgment was rendered thereon.

For the appellant there was a brief by *E. C. Alvord* and *John Walsh,* and oral argument by *Mr. Walsh.*

John J. Fisher, for the respondent, contended, *inter alia,* that the instruction to engage Capt. Garland and the request for a more detailed agreement were nothing more than an effort to explain or modify a contract already made. They did not affect the acceptance nor constitute a condition attached thereto. 9 Cyc. 283, 284; *Turner v. McCormick,* 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853; *Purrington v. Grimm,* 83 Vt. 466, 76 Atl. 158, 159; *Matteson v. Scofield,* 27 Wis. 671; *Kreutzer v. Lynch,* 122 Wis. 474, 100 N. W. 887.

Marshall, J. A question is presented respecting whether the court gave the jury the proper rule of damages, and whether there was any evidence to properly establish dam-

ages; but the view we take of the case renders such questions immaterial.

The trial court construed the occurrences between Mr. Hawley and respondent as having operated to close a contract for the use of the former's tugboat, irrespective of whether Capt. Garland was secured to command it, prior to receipt by Mr. Hawley of the letter of November 3, 1907. The reasoning by which such conclusion was reached appears in the record, is sufficiently mentioned in the statement, and seems infirm in several particulars.

Much stress was placed upon the word sent by Mr. Hawley to respondent in reply to the latter's offer to pay $300 for the season's use of the tug. It is said in the judge's opinion, that these words were used: "Close contract," "Terms accepted." We do not find the words "Close contract" were used,—only the words "Terms accepted. Engage Capt. Garland, writing." The only terms mentioned in the offer were in these words: "Go for three hundred for thirty days, you pay expenses one way." That was referred to in plaintiff's letter of November 3d as an acceptance which closed a contract; but it is plainly not that. It was only a counter offer to the one mentioned in the communication to Mr. Hawley, offering $300 for use of the tug for the season to depend on conditions. The counter offer covered both subjects. So up to this point there, certainly, had not been any meeting of minds. The reply to the counter offer accepted the terms as to price and expense; but, added the words "Engage Capt. Garland, writing." Such reply was quite ambiguous. The natural inference therefrom was that the terms mentioned by Mr. Hawley, as to compensation and length of the season, were accepted; but Capt. Garland should be engaged to command the boat and an explanation would be made by letter. The words "Engage Capt. Garland" and the word "writing" were tied together and pretty plainly suggested that the contractual details were still to be settled and the signification of the words

"Engage Capt. Garland, writing," would be made known in due course. Now what followed by letter does not appear to have been given due weight by the trial judge in coming to a conclusion, as to whether the reference to Capt. Garland was merely suggestive or matter of condition. Standing alone, it might fairly be construed to be the former. Mr. Hawley seems to have been somewhat uncertain and so made no immediate reply; but, waited for the letter. When that came it, doubtless, seemed quite plain to him that the actual closing of the contract was, in the judgment of respondent, to wait upon acceptance of its choice of a person to command the boat and execution of a written lease as to terms.

The letter stated with reference to the proposed lease, "Please sign one copy and return it to us at once so that we will know the matter is settled." That plainly indicated it was not to be understood a contract had been closed in advance of the writing being signed. The letter further, unmistakably, indicates that the lease, as written, was not intended to cover the entire matter. It made no reference to the condition contained in Mr. Hawley's letter as to respondent paying expenses one way, nor to the ambiguous language in the telegram: "Engage Capt. Garland." The former was covered in the letter thus: "We have not mentioned this matter in the lease; but we agree to pay expenses one way *en route*." The latter was covered thus: "We wired you this morning that your terms were accepted and to engage Capt. Garland, and we will write him also and engage his services. We want no other man if we can get him." Thus emphasizing the words of acceptance as referring only to the price for use of the boat and the term of service, and giving the reference to Capt. Garland the cast of a condition.

How could Mr. Hawley otherwise have understood the telegram than as suggested in connection with the matter? If it be true that respondent did not mean to convey such an idea; but used language leading Mr. Hawley, in the exercise of or-

dinary care, to suppose it did, it must bear the burden of its fault. He had a right to act upon the meaning which respondent's words conveyed to him, if such, reasonably, might be the meaning an ordinarily careful person would read out of such language under the same or similar circumstances. The letter not only declared that respondent wanted no other person to command the boat if he could be secured; but, took the matter of settling the question out of Mr. Hawley's hands, saying it would write Capt. Garland and engage him. Nothing occurred thereafter indicating that Mr. Hawley was agreeable to placing his boat in charge of Garland. On the contrary he made known, promptly, by telephone, that he would not accede to that, but stand by his choice which was Capt. McClain. It does not appear that respondent receded till the letter of November 3, 1909, was written. There the counter offer made by Mr. Hawley, October 27th before, was referred to as an acceptance,—a very singular circumstance,—showing a purpose to claim the existence of a contract by a misconstruction of Mr. Hawley's telegram. There was nothing in the nature of an acceptance until the telegram was sent by respondent in response to Mr. Hawley's counter offer. Note the peculiar language of respondent's letter: "On the day we received *your wired acceptance* of our offer we had almost concluded a deal for the 'Curry;' but were very glad that we did not have to engage her as she is altogether too slow. Now, however, we cannot, possibly, get along without your boat as all other boats suitable for herring fishing have been engaged." That was followed by language suggesting consent to Capt. McClain as commander of the boat; but still showing preference for Capt. Garland.

It seems clear that respondent did not recede from its demand until it found it could not obtain the use of the boat on the condition it had imposed and that there was no other boat obtainable. Before the November 3d letter was received Mr. Hawley had leased his boat to another party. Had the

trial court given proper significance to the letter explaining the first reference to Garland, instead of leaving it entirely out of view, as is clearly indicated in the opinion was done on the motion to direct a verdict, and in some way viewed the case as if respondent's reply to Mr. Hawley's counter offer contained the words "close contract" when no such words were therein, it seems clear that the conclusion would not have been reached that, by such telegram, the minds of the parties met and a contract was closed, irrespective of whether Capt. Garland was engaged to command the boat or not.

In view of the foregoing, it is considered that the motion to direct a verdict should have been granted.

By the Court.—The judgment is reversed, and cause remanded with directions to render judgment in favor of the defendant dismissing the cause with costs.

STATE EX REL. HEBERT and others, Respondents, vs. CARLSON, imp., Appellant.

September 20—October 8, 1912.

Joint school districts: Alteration: Jurisdiction: Failure to give notice: Certiorari: *To whom directed: Who may sue out the writ: Laches.*

1. A writ of *certiorari* to review the action taken at a joint meeting of two town boards and a village board to pass upon a petition for alteration of school district boundaries, was directed, among others, to the town clerks, to the village clerk who had acted as clerk of said joint meeting, and also to his successor in office. The former village clerk made return that he had kept a record of the meeting and had turned over all papers pertaining thereto to his successor. The successor made return of the records as within his official custody. *Held*, that the writ could not be quashed for misdirection.
2. Unless the statutes (secs. 418, 419*a*, Stats.: Supp. 1906) relating to notice of the meeting to pass upon a proposed alteration of a school district are complied with there is no jurisdiction to make such alteration.

3. Resident taxpayers in a school district, having children of school age, have such an interest in the matter as entitles them to invoke the remedy of *certiorari* to review a proceeding to alter such district.
4. The fact that a writ of *certiorari* to review a proceeding to alter a school district was quashed for misdirection and because the relators did not show that they had an interest entitling them to sue out the writ, does not avail to show unnecessary delay or laches on the part of relators who promptly thereafter applied for a second writ.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This is a *certiorari* proceeding to review the action of the town boards of the towns of Unity and Brighton and the village board of the village of Unity, parts of which towns and village constituted a joint school district in Clark and Marathon counties, acting jointly, in attempting to detach from joint school district No. 1 of the towns of Unity and Brighton and the village of Unity certain territory, and in attaching part of the detached territory to joint school district No. 5 of the towns of Unity and Brighton and the balance to school district No. 3 of the town of Brighton.

The petition for the writ alleges that the relators *Charles Hebert* and *Charles Nelson* are resident freeholders and taxpayers in joint school district No. 5 and that they have children of school age attending school in the district, and that the relator *Paul Bruer* is a resident freeholder and taxpayer in school district No. 1 and that he has children of school age attending the district school. The petition alleges that the proceedings taken by the joint meeting of the town and village boards in altering the school district boundaries are void, in that no notice was given to the clerks, to any of the other officers, or to the inhabitants of the school districts affected of the proposed joint meeting, that there was no return of any notices of the meeting, that the record of the proceedings of the meeting was not properly kept, that there was no legal

petition sufficient to confer jurisdiction on the officers at the joint meeting, that the meeting was not held at the school house as the statutes require, and that the place of meeting was not designated as other than the school house on the ground of convenience, that the order of alteration was never properly executed, that the order was not filed with either of the clerks of the school districts affected by the alteration, and that the clerks have had no legal notice of the order.

The return to the writ by the respondent who was clerk of the village at the time the order was made is that he sent out notices of the meeting to each member of the several boards interested at least five days before the meeting, that upon request he acted as clerk of the meeting and kept a record of the proceedings, and that upon surrendering his office of village clerk he turned over to his successor all papers pertaining to the meeting.

The return of his successor, the present clerk of the village, showed a petition of the supervisors of the town of Brighton asking the alteration of the district, the record of the meeting showing that the petition had been read and the subject opened for discussion, that a ballot had been taken and the petition granted, and the order making the alteration signed by the members of the joint meeting. There was no record of any notices having been given or that the order issued had been acted upon and signed formally by the members.

The officers to whom the writ was directed made return to the writ, but none of them and neither of the towns nor the village of which they were the officers have appeared to oppose the granting of the relief prayed for by the relators. *A. F. Carlson,* a resident and taxpayer and a district officer of one of the districts affected, was allowed to present objections to the granting of the relief asked.

The court permitted an amendment to the petition for the writ which shows that the relator *Charles Hebert* was at all of the times mentioned the school district clerk of one of the

districts affected by the action taken at the joint meeting of the town and village boards.

One of the objections made to the granting of the relief prayed for in the petition was that the petitioners were guilty of laches which should bar them from the relief asked. This proceeding was commenced promptly after the quashing of a previous writ, which was quashed because of misdirection and for failure to show a proper interest in the relators.

The record fails to show that the members of the town and village boards were notified of the time and place of the joint meeting and that the relator *Hebert* as clerk of his school district had received notice pursuant to sec. 419*a* and sec. 418, Stats. (Supp. 1906), of the time and place of the joint meeting to act upon the proposed alteration, and, since the record wholly failed to show such notice, the court held that the joint meeting was without jurisdiction and that the attempted alteration was void.

This is an appeal from the judgment granting the prayer of the petition.

The cause was submitted for the appellant on the brief of *Regner & Ringle,* and for the respondents on that of *C. B. Edwards,* attorney, and *Kreutzer, Bird, Rosenberry & Okoneski,* of counsel.

SIEBECKER, J. It is urged that the *certiorari* proceeding should have been dismissed because the writ was not directed to the proper party. The argument is that the only person on whom the statute could be held to impose the duty of keeping the record of the proceedings of the joint meeting of the town and village boards for the alteration of this school district is the person who acted as clerk of this joint meeting when they met to act in the matter. Pursuant to sec. 2421, Stats. (Supp. 1906: Laws of 1901, ch. 146), the writ should be addressed to the clerk or clerks of the towns and villages interested in the proceeding to alter the boundaries of the dis-

trict. The clerk of the village of Unity acted as clerk of the joint meeting of the town and village boards, and as such clerk acted as clerk at this meeting. He had custody of the records and turned them over to his successor in office, who was a party to the writ and made return of the records as within his official custody. This makes him a proper party and suffices to sustain the proceeding. Hence the court properly refused to quash the writ for misdirection.

It is contended that it appears from the return that the proceedings were irregular and void for want of notice being given as required by secs. 418 and 419*a*, Stats. (Supp. 1906), to the clerks of the school districts affected by the proceedings of the joint meeting of the town and village boards in altering the boundaries of the district, because no copies of the order attempting to alter such boundaries were recorded or filed in the offices of the clerks of the districts interested, and because the required notices of the time and place of the meeting to consider the application for alteration were not served on the members of the town and village boards, which meeting is required to be held at the school house of the joint district unless some other convenient place be designated. It is manifest that the requirements of the statutes respecting the giving of notice were not complied with, and that such omission renders the attempted proceedings and the alteration of the district void. *State ex rel. Bidgood v. Clifton,* 113 Wis. 107, 88 N. W. 1019; *State ex rel. Stengl v. Cary,* 132 Wis. 501, 112 N. W. 428.

The trial court held that the relators, *Hebert, Nelson,* and *Bruer,* as taxpayers and residents of the old districts having children who attended school, were not sufficiently interested in the determination altering the districts to entitle them to institute the *certiorari* proceedings. They were not made parties to the record of the proceeding attempting to alter the district. It is apparent that the town and village board members, who attempted to make the alteration, took no step—naturally they would be averse—to test the validity of their

action in a *certiorari* proceeding. Nor did the boards of the school districts interested take any step to inquire into the validity thereof. Unless, then, the resident taxpayers and parents of children of school age of the district could act in the matter it is evident they would be remediless under the facts and circumstances shown. The interest of resident electors and taxpayers in school district affairs pertaining to the creation and alteration of districts was well expressed in the opinion of this court in the case of *State ex rel. Foster v. Graham,* 60 Wis. 395, 19 N. W. 359, wherein Mr. Chief Justice COLE, in discussing the object and purpose of the notices required to be given the district clerks and the members of the school boards, states:

"In this way, presumably, information in regard to the proposed alteration will come to the knowledge of the people of the district, who can have an opportunity to express their views upon the alteration before the town boards when they meet to decide upon it. This is obviously the intent and purpose of having the notices given. The formation, alteration, and dissolution of school districts are matters which vitally concern the people, and in which they take a most lively interest."

When such interest also involves that of a taxpayer of the district, whose children of school age are affected in their school facilities, it manifestly presents a case of real and direct interest in the matter which may be seriously injured by the action of the town board. The relators as resident taxpayers of the district have shown that they have such an interest, and this entitles them to invoke the remedy of *certiorari.* Their complaint brings them within the principle declared in *State ex rel. Milwaukee Med. College v. Chittenden,* 127 Wis. 468, 107 N. W. 500, where the court declared:

"It is not an absolute essential to competency in such cases that the petitioner should be a party to the record in the proceeding sought to be reviewed, nor necessary that he should be the party wronged, as regards a proper citation being essential to jurisdiction of the subject matter."

State ex rel. Graef v. Forest Co. 74 Wis. 610, 43 N. W. 551, is cited, where *certiorari* to test the validity of the county board's action was sustained at the instance of a taxpayer. In the following cases *certiorari* proceedings to review the action of town boards for altering school district boundaries were instituted by residents of the districts: *State ex rel. Graff v. Steele,* 106 Wis. 475, 82 N. W. 295; *State ex rel. Bidgood v. Clifton,* 113 Wis. 107, 88 N. W. 1019; *State ex rel. Foster v. Graham,* 60 Wis. 395, 19 N. W. 359. The right to institute *certiorari* proceedings in this case seems well sustained upon principle and in practice, as shown by the foregoing adjudications. See, also, *Lutien v. Kewaunee,* 143 Wis. 242, 126 N. W. 662, 127 N. W. 942, and sec. 497, Stats. (1898), which entitles residents of the districts affected to an appeal in such a proceeding if they deem themselves aggrieved. The trial court erroneously held that the relators suffered no injury entitling them to invoke the aid of a court to test the validity of the proceedings to alter the districts. In arriving at this conclusion the court took the view that, within the holding in the cases of *State ex rel. Sullivan v. Drake,* 130 Wis. 152, 109 N. W. 982; *State ex rel. Skogstad v. Anderson,* 130 Wis. 227, 109 N. W. 981; and *State ex rel. Milwaukee Med. College v. Chittenden, supra,* an enforcement of the decision altering the district would not involve any special, immediate, and direct injury to the relators' interests. This, for the reasons stated above, cannot be sustained.

The claim that the relators were guilty of laches is not sustained. They proceeded with due diligence after notice of the attempted action by the town and village boards. The fact that the first writ was quashed does not avail to charge them with unnecessary delay in instituting this, the second proceeding to review the action of the boards. The trial court properly exercised its discretion in awarding the writ.

By the Court.—The judgment appealed from is affirmed.

KOBIN, Respondent, vs. SAINT PAUL FIRE & MARINE INSURANCE COMPANY, Appellant.

September 20—October 8, 1912.

Insurance against fire: Proof of title to realty: Possession: False swearing by insured: Findings of fact: Evidence: Burden of proof.

1. **In an action to recover for a loss under a policy insuring a dwelling house, proof of possession of the property at and prior to the time when the policy was issued was sufficient *prima facie* evidence of plaintiff's title to the real estate, especially where the policy described the house as his and was issued upon a written application stating that the building was upon land owned by him.**
2. **Although plaintiff contradicted himself several times and gave some evidence strongly indicating that he wilfully swore falsely, yet upon the whole record, it appearing among other things that he did not understand the English language well and that he was considerably confused in answering questions on cross-examination, it is *held* that findings by the jury to the effect that neither in his proofs of loss nor in his examination before a justice under the policy had he knowingly and intentionally sworn falsely as to matters relating to the insurance, should not be disturbed.**
3. **An instruction to the jury in such case that the burden of proof both as to falsity of statement and as to wilfully false swearing was upon the defendant, was correct. The burden of proof did not shift.**

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

This action was brought to recover damages for a loss under a Wisconsin standard fire insurance policy covering a dwelling house and furniture and other property. A fire occurred June 13, 1910, destroying the dwelling house and part of the household furniture. The answer set up that the loss resulted solely by reason of the wrongful act and design of the plaintiff by setting fire with intent to destroy the property and defraud the defendant, and also fraud in preparing

and presenting statement of loss alleged to have been sustained, and by falsely swearing respecting amount of loss. The court denied a motion for directed verdict and the jury returned the following:

"(1) What direct loss or damage did plaintiff suffer by the fire in question to the personal property listed in his proofs of loss, 'Exhibit 2'? *A.* $600.

"(2) Did plaintiff, in his proofs of loss, 'Exhibit 2,' knowingly and intentionally swear falsely touching any matter relating to this insurance or subject thereof? *A.* No.

"(3) Did plaintiff, in his examination before Justice Nightingale, under the policy, knowingly and intentionally swear falsely touching any matter relating to this insurance or the subject thereof? *A.* No.

"(4) If you answer either question number 2 or question number 3 'Yes,' then was such false swearing done with intent to mislead the defendant and induce it to act to its injury? *A.* ——."

The defendant made the usual motions after verdict, which were respectively denied. Judgment was entered for the plaintiff, from which this appeal was taken.

Daniel H. Grady, for the appellant.

For the respondent there was a brief by *John F. Hooper,* attorney, and *Kreutzer, Bird, Rosenberry & Okoneski,* counsel, and oral argument by *Claire B. Bird.*

Kerwin, J. The first error assigned is that there was no proof of plaintiff's title in fee simple in the real estate upon which the building destroyed by fire stood. It is claimed on the part of the appellant that the title could not be established by oral testimony, and that the best evidence of title to real property, when the same is in issue, consists in such muniments of title as deeds, mortgages, etc., and that unless the absence of such evidence is satisfactorily explained parol evidence will not be received to prove title. In the instant case the plaintiff proved possession of the property at and prior to the time the policy was issued. Besides, the policy issued

upon plaintiff's house described it as "his two-story, shingle roof, frame dwelling house" and was issued upon a written application representing that the building was upon land owned by the plaintiff.

Proof of possession is sufficient *prima facie* evidence of title to real estate, and the evidence here went beyond that and is ample to make a *prima facie* case of title in plaintiff. *Wausau B. Co. v. Plumer,* 35 Wis. 274, 281; *Loberg v. Amherst,* 87 Wis. 634, 58 N. W. 1048; 4 Wigmore, Ev. § 2515.

Counsel for appellant attacks the answers to the second and third questions of the special verdict as not being supported by the evidence. It is true plaintiff in his evidence contradicted himself several times and gave some evidence which would strongly indicate that he wilfully swore falsely. But after a careful examination of all the evidence we are not prepared to say that the answers of the jury to these questions should be disturbed. It appears from the record, and was so stated by the trial judge, that the plaintiff did not understand the English language well and apparently was considerably confused in answering questions under the very severe cross-examination by counsel for appellant. The court below and the jury were in far better position to judge of the credibility of the evidence of plaintiff than we are. After a careful examination of the record the court is of opinion that the answers of the jury to the second and third questions of the special verdict should not be disturbed. *Meyer v. Home Ins. Co.* 127 Wis. 293, 106 N. W. 1087; *Wunderlich v. Palatine Ins. Co.* 115 Wis. 509, 92 N. W. 264.

It is insisted in the brief of counsel for appellant, and also was pressed in argument here, that the court committed reversible error in its instructions upon the burden of proof wherein it instructed that the burden of proof on both the falsity of statement and wilfully false swearing was upon the defendant, and it was claimed, in view of the evidence produced, that the burden of proof was shifted. There was no

error in the charge. The burden of proof did not shift. *Winn v. Itzel,* 125 Wis. 19, 103 N. W. 220.

There are some other detailed errors assigned, which we have examined but deem unnecessary to discuss. We find no prejudicial error in the record.

By the Court.—The judgment is affirmed.

BRASCH, Respondent, vs. ROTHSCHILD WATER POWER COMPANY, Appellant.

September 21—October 8, 1912.

Waters: Dams: Flowage of land: Consent of owner: Release: Contract construed: Statutes: Action for damages: Evidence.

1. Under a contract made in 1906 defendant had the right to overflow, by means of a dam thereafter to be erected, any part of a certain tract of land owned by plaintiff, for a compensation to plaintiff of $25 per acre. Pursuant to such contract it was in 1907, before the dam was constructed, by mutual agreement and arbitration determined that 1.2 acres would be overflowed and, in consideration of $30 paid by defendant, plaintiff acknowledged satisfaction and discharge of any damages that might thereafter be caused "by such flowage," and defendant released "the balance of the land" from the contract of 1906. In arriving at such amount of overflow it was assumed that the dam would have a head of nineteen feet, but it was afterwards constructed with a head of twenty feet, and a large area of the land in excess of 1.2 acres was flooded thereby. *Held,* that the words "such flowage" in the agreement of 1907 meant the flowage of 1.2 acres; that by the release in that agreement defendant had given up all right under the contract of 1906 to overflow the "balance of the land," meaning the remainder thereof after subtracting the 1.2 acres; and that therefore there was no consent by plaintiff to the flooding of such remainder.
2. Neither the general milldam law (ch. 146, Stats. 1898) nor sec. 1852, Stats. (1898), governs the case.
3. The defendant being the assignee of the persons authorized by ch. 155, Laws of 1903, to build the dam, and holding its power

of eminent domain under that statute, to be exercised as provided in secs. 1777*a*–1777*d*, Stats. (1898), the plaintiff had the right to maintain an action for the flowing of the remainder of his land, unless such action should be stayed upon defendant's application under sec. 1777*d*.

4. Plaintiff was not bound in such action to show what damage was caused by a dam at a twenty-foot head over and above the damage caused by a nineteen-foot head, but was entitled to recover for all damage to the remainder of his land, excluding the 1.2 acres.

APPEAL from a judgment of the circuit court for Marathon county: A. H. REID, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Brown, Pradt & Genrich,* attorneys, and *M. B. Rosenberry,* of counsel, and oral argument by *Mr. Rosenberry* and *Mr. L. A. Pradt.*

For the respondent the cause was submitted on the brief of *Regner & Ringle.*

TIMLIN, J. The complaint averred ownership and possession by the plaintiff of a specified tract of land bordering on Rib river, an affluent of the Wisconsin river, and that the defendant by means of a dam constructed in the Wisconsin river below the inflow of the Rib river, prior to 1911, had caused the waters of the Rib river to set back and during the months of April, May, and June, 1911, to overflow the land of plaintiff, causing damage. The defendant admitted its corporate existence and the ownership and possession of the land by plaintiff, and further interposed a general denial and the special defense that plaintiff and wife had, on or about February 27, 1906, entered into an agreement in writing with a corporation known as Mathie Brothers Land Company, assignor of defendant, whereby for a consideration there was granted to said Mathie Brothers Land Company the right to overflow any part of said land by means of said dam for a compensation to plaintiff of $25 per acre for such overflowed land. The defendant constructed said dam under the authority and pursuant to the terms and conditions of ch. 155,

Laws of 1903, and as transferee of the persons therein named. It is also averred that the defendant began the construction of said dam in the early part of the year 1909 and completed the dam in December, 1910, and that defendant is a public utility corporation of the state of Wisconsin and was organized for the purpose of developing, creating, selling, and distributing to the public hydraulic and electric power created and generated at said dam. The answer further set forth a transaction between the plaintiff and defendant on the 28th day of December, 1907, before the construction of the dam and pursuant to the alleged contract of February 27, 1906, whereby by mutual agreement and arbitration it was determined that one and two-tenths acres of said plaintiff's land would be overflowed, and that in consideration of the sum of $30 paid to the plaintiff and his wife by the defendant the plaintiff and his said wife did acknowledge payment and satisfaction in full of any and all damages that might thereafter be caused to the plaintiff by such flowage, and the defendant on its part released the balance of the land described in said contract from said contract of February 27, 1906. It was shown that such transaction took place, and that it was assumed in arriving at the amount of overflow that the dam would have a nineteen-foot head, but the dam was afterward constructed with a twenty-foot head. The controversy hinges largely upon the legal effect of this last transaction upon plaintiff's right to recover damages for an overflow occurring in 1911. At the close of the evidence the defendant moved for a nonsuit, which motion was denied by the court. The learned circuit court construed the contract as a grant of the right to overflow an area of land, that area to be ascertained after the dam was completed and the waters were set back. The subsequent proceedings meant that the parties did not wait for this mode of ascertainment, but undertook to ascertain by a theoretical process and did ascertain that there would be one and two-tenths acres overflowed,

whereupon they received payment at the rate fixed for one and two-tenths acres and the contract was by mutual consent released so as to have no further binding effect upon either party. The circuit judge submitted the cause to the jury under instructions which put this construction upon the writing and uncontroverted acts of the parties thereunder.

The appellant argues, first, that plaintiff cannot maintain this action because the transaction of December 28, 1907, amounted to a payment for the flowage of his land by the defendant's dam and plaintiff has acknowledged satisfaction for any damages caused by such flowage. Second, the dam of the defendant having been built by consent of the plaintiff, no action for wrongful flowage by the dam can be maintained by the plaintiff against defendant, but the remedy for damages for such flowage, if any, for which he has not already been compensated must be under the provisions of sec. 1777*a* to sec. 1777*d*, Stats. (1898), inclusive. Third, the burden of proof is on the plaintiff to establish the amount of damages, therefore he cannot recover in this cause without showing what overflow was caused by the dam at a twenty-foot head over and above the damages caused by a dam at nineteen-foot head.

The contract of February 27, 1906, was unquestionably valid and binding and it fixed the damages at $25 per acre for all of the plaintiff's land which might be overflowed, the area of such overflow to be determined by a survey after the dam was constructed. If the land was worth less than $25 per acre, this contract was a distinct advantage to the landowner and a corresponding disadvantage to the owner of the dam. Without waiting for the building of the dam the parties undertook on December 28, 1907, to compute the number of acres which would be overflowed by the dam when built. Pursuant to the first mentioned contract they selected arbitrators, a survey was made, wherein it was assumed that the dam would be of a height sufficient to create a nineteen-foot

head of water at the dam, and arrived at the conclusion that this would overflow one and two-tenths acres of plaintiff's land. Plaintiff was paid the $30 which would be his if this estimate were correct and if the dam had been built. The following stipulation was inserted in a contract then signed by both parties:

"Now, therefore, in consideration of the sum of thirty dollars ($30) paid by the party of the second part to the parties of the first part for such overflowed land, the parties of the first part acknowledge satisfaction and discharge of any damages that may hereafter be caused them by such flowage, and the party of the second part hereby releases the balance of the land in said southwest quarter of said section 32 from said contract so made and dated the 27th day of February, 1906."

This is capable of two somewhat different constructions. "Satisfaction and discharge of any damages that may hereafter be caused them by such flowage" may mean the flowage of one and two-tenths acres, or it may mean the flowage caused by a dam having a nineteen-foot head. Nothing is said about the height of the dam in the contract of December 28, 1907, but that height is referred to in a map used by the surveyors in making their computation of the overflowed area, and this map is referred to in the latter contract. But whatever ambiguity exists upon this point, there is in our estimation none whatever with reference to the release by the corporation of the remainder of the land from said contract. This left the remainder of plaintiff's land free from the restrictions and obligations of the contract of February 27th. The remainder of the land is what was left after subtracting one and two-tenths acres. The remainder, called in said contract "the balance," of plaintiff's land occupied thereafter the same relation to this dam and to the defendant's right to flood plaintiff's land as if the contract of February 27th had never been made. That clause therefore gave character to the words "such flowage" and limited those words to the flowage of the one and two-tenths acres. A dam with a twenty-foot head

was built and a large area of the "balance" or remainder of plaintiff's land was overflowed in consequence thereof. Plaintiff brought this action for damages. By reason of the release and discharge of the contract there was no consent on the part of the plaintiff to the subsequent flooding of the remainder of plaintiff's land by the defendant's dam. The case is not governed by the milldam law (ch. 146, Stats. 1898) or any analogy derived therefrom in this respect, because that law expressly prohibits actions to recover damages except as therein provided. Neither is the case governed by sec. 1852, Stats. (1898), which is the railroad condemnation statute relating to instances where the railway company is in possession of a roadbed and tracks on the land of another, having entered by his consent, tacit or express. This corporation holds its power of eminent domain under ch. 155, Laws of 1903, as the successor and assignee of the persons to whom that act grants the right to build and maintain a dam. That statute provides for acquiring title to overflowed lands through condemnation proceedings under the power of eminent domain as provided in secs. 1777*a*, 1777*b*, 1777*c*, and 1777*d*, Stats. (1898). Turning to these statutes we find that the power there given is to overflow lands and to acquire title thereto by purchase, or in case the corporation cannot agree with the owner for the purchase, lease, or use of the land or any easement therein that may be necessary for the corporation, or cannot agree upon the compensation to be made to such owner, then either the corporation or the owner of any lands so required may apply by petition to the circuit court for the appointment of appraisers, etc. Sec. 1777*a*. But it is also provided that in case such corporation shall not have acquired title to the lands upon which it shall have heretofore constructed its dam or any part thereof, the court, or the presiding judge thereof, may authorize the corporation to continue in possession and use and overflow such lands as have theretofore been overflowed, during the pendency of proceed-

ings, and may stay actions or proceedings against such corporation on account thereof, on its paying into court a sufficient sum, or giving such security as such court or presiding judge may direct, to pay the compensation when finally ascertained. This statute recognizes the right to maintain an action against the corporation on account of its flowing the land. The court may, it is true, stay this action against the corporation upon application of that corporation and upon its paying into court a sufficient sum or giving such security as the court or the presiding judge may direct to pay compensation therefor when finally ascertained. This is the only mode of getting rid of such action by the owner of overflowed land provided in the statute. After this stay and security given, if the corporation delays or omits to prosecute the condemnation proceedings at its cost and expense then the landowner may do so. Sec. 1777*d*. This is quite a different statute from that relating to milldams or that relating to railroads. There is no such application for stay here made to the circuit court. It may be that the corporation does not want this land. The overflow for which the damages are sought may have been temporary, caused by an inadvertently closed gate or an inadvertent failure to remove flash-boards; or the corporation may for other reasons not desire to take the land. In any event there is no valid ground for this objection.

The third objection by appellant is not well taken. The court instructed the jurors as follows:

"The burden rests upon the plaintiff to satisfy the jury to a reasonable certainty by the greater weight of the evidence on the questions, both that the defendant by its maintenance of said dam and of a head of water caused the plaintiff's lands other and further than one and two-tenths acres to be overflowed during the period of April, May, and June, 1911, and thereby damaged, and also that the plaintiff has thereby suffered loss and damage in some amount ascertainable to a reasonable certainty from the evidence received on this trial."

No request was made for more specific instruction on this point. This was a sufficient submission of the cause to the

jury, enabling that body to distinguish between damages caused to one and two-tenths acres and damages caused to the remainder of plaintiff's land by the overflow, and permitting them to award against the defendant only the latter damages. It follows that the judgment of the circuit court must be affirmed.

By the Court.—Judgment affirmed.

FIRST NATIONAL BANK OF CRANDON, Respondent, vs. UNITED STATES FIDELITY & GUARANTY COMPANY, Appellant.

September 21—October 8, 1912.

Fidelity insurance: Indemnity bond: Construction: Exhausting remedy against others: "Knowledge" of the employer: Pleading: Defenses: Representations in application: Negligence: Bad faith: Findings of fact: Banks and banking: "Kiting" checks.

1. An indemnity bond issued by a surety company insuring a bank against loss through dishonesty of employees, providing that the employer might at any time transfer an employee from one position to another without notice to the company, was not affected by the promotion, without notice to the company, of the assistant cashier to be cashier, especially where such change was one in name only and did not alter the character of the work done by such employee.
2. An indemnity bond by which a surety company agrees to pay to the employer the amount of any loss he shall sustain "through the dishonesty . . . or through any act of omission or commission of any of the employees, done or omitted in bad faith," and which provides for prompt notice of any loss, for the furnishing of proof thereof within six months, and that no action shall be maintained on the bond unless commenced within one year from the time of making claim for the loss, is essentially an insurance contract guarantying payment, and is not a mere guaranty of collection upon which the employer can recover only after exhausting his remedies against those primarily liable.
3. A provision in such a bond that the employer shall notify the surety company of certain facts—such as that an employee is

dishonest or has acted in bad faith—if the same shall "come to the knowledge of the employer," is construed to mean *actual* knowledge, and not mere constructive notice. It did not, in this case, require a bank to notify the company of facts of which it had no actual knowledge, but of which it might have known had its officers made a critical examination of its books from time to time.

4. Where an indemnity bond insuring a bank against loss through dishonesty of its employees did not require examinations of the books of the bank to be made, representations in the application for the bond that the bank would be examined periodically by its officers and directors should, in order to be available as a defense to an action on the bond, be pleaded.
5. Mere negligence in respect to such examinations on the part of the officers or directors of the bank, resulting in a loss, is not a defense to an action on the bond unless the negligence was such as to amount to fraud or bad faith.
6. A finding of fact by the trial court, to the effect that transactions prior to the issuance of the bond, in which a "kiting" of checks had been permitted by an employee of the bank, were the result of ignorance and an error in judgment and not of any bad faith on the part of such employee, is *held* to be sustained by the evidence.

Appeal from a judgment of the circuit court for Marathon county: A. H. Reid, Circuit Judge. *Affirmed.*

On September 28, 1909, the defendant for a valuable consideration executed and delivered to the plaintiff its contract of indemnity whereby it agreed as follows:

"That it will, at the expiration of three months after proofs of loss shall have been furnished to the company, pay to the employer the amount of any loss or damage that shall happen to the employer in respect to any funds, property, or estate belonging to or in the custody of the employer, through the dishonesty of any of the employees, or through any act of omission or commission of any of the employees, done or omitted in bad faith and not through mere negligence, incompetency, or any error of judgment, and whether such dishonesty or such act of omission or commission occurs in the performance of any duty or trust specially assigned to such employee or occurs otherwise," not exceeding $10,000.

The contract provided that it should cover acts occurring from April 15, 1909, to April 15, 1910, and that by agreement it might be continued in force from year to year. It was so continued for one year from April 15, 1910. One Eidsmoe was employed as assistant cashier by the plaintiff at the time the contract became effective, and held that position until January, 1910, when he was elected cashier. While acting as assistant cashier and cashier, Eidsmoe permitted one Price to obtain fictitious credit at the bank by the process of "kiting checks;" that is to say, by allowing Price to receive credit for checks drawn on other banks in which he had no funds to meet them, and by permitting him to withdraw from the plaintiff bank moneys to the amount of the fictitious checks so deposited. This practice covered a considerable period of time, and on July 26, 1910, Price had secured $26,220 of the funds of the bank by reason of the deposit of such fictitious checks. Plaintiff brought this action to recover $10,000, being the full amount of the bond.

The defendant set up four defenses in its answer. As its first defense it pleaded the following clause in the contract:

"The employer further covenants and agrees that if at any time during the term for which this bond is written, or during any continuance hereof, there shall come to the knowledge of the employer the fact that any employee for whom the company may be bound under this bond is dishonest or has in bad faith and not through mere negligence or error of judgment done or neglected to do any matter or thing, or that any such employee habitually gambles, uses intoxicating liquors to excess, frequents houses of illfame, or is a spendthrift living beyond his or her means, the employer shall promptly notify the company of such fact, and the failure so to do shall relieve the company from all liability on account of such employee, in respect of loss or damage thereafter arising."

The answer then alleged that the defendant's officers and directors had knowledge of the practice pursued by Eidsmoe before Price had withdrawn any considerable sum from the

bank; that the acts of Eidsmoe were authorized by the officers of the bank and therefore there was no wrongdoing on his part, but that if they were not authorized the defendant was discharged from liability because of plaintiff's failure to promptly notify defendant of Eidsmoe's wrongful acts after it had knowledge thereof.

For a second defense it was urged that Eidsmoe was assistant cashier when the contract was made and that he was thereafter made cashier without notice to the defendant; that the losses sued for were sustained while he occupied the latter position; and that such change without notice was contrary to the representations made by the plaintiff in its application for a bond and operated to discharge the defendant from liability.

For a third defense it was alleged that the plaintiff had not suffered any loss through Eidsmoe's acts; that Price was solvent and had either paid or secured his indebtedness to the bank.

For a fourth defense the defendant set forth that the acts of Eidsmoe were the result of incompetency and error in judgment and not of bad faith, and that the bond did not indemnify the plaintiff against the mistakes or errors in judgment of its employees. By the terms of the contract the defendant obligated itself to make good only such losses as occurred through the dishonesty or bad faith of the employee.

Among other things the court found that between the 5th of January, 1910, and the 25th day of July, 1910, Eidsmoe knowingly and intentionally permitted, allowed, and assisted Price to withdraw from the funds of the bank money which he was not entitled to withdraw, to the amount of $26,220; that such withdrawal was accomplished by means of kiting checks, so that the amount so procured did not appear as an overdraft in the account of said Price on the books of the bank; that plaintiff collected of said Price $7,000 and no more, and that by the acts of Eidsmoe it suffered loss and damage amounting to over $19,000; that Eidsmoe allowed

said Price to withdraw said sums of money and acted in collusion with him, knowing that it was a breach of his duty as an employee of said bank so to do, and with knowledge that the funds of the bank were being thereby illegally transferred to said Price; that Price had engaged in the process of kiting checks as early as October, 1908, and the fact that he was doing or had done so came to the knowledge of W. B. McArthur, president of the plaintiff bank, as early as the month of May, 1909, at which time and from that time forward the said McArthur instructed said Eidsmoe to accept no checks of said Price without satisfactory assurance, either by advice from the bank, indorsements secured, or a similar method, that the same would be paid on presentation; that then for the first time Eidsmoe understood the process and effect of kiting checks, and he then observed McArthur's instructions and the practice of accepting Price's checks on outside banks, whether secured or not, practically ceased in June, 1909, and that up to this time Eidsmoe acted wholly in good faith; that McArthur had no notice or knowledge that said instructions were not being followed or that said Price was thereafter carrying on the process of kiting checks, until the month of August, 1910, when said loss was discovered by the bank examiner and was reported to the officers and directors of the bank; that except as above found neither the plaintiff nor any of its officers or directors had any knowledge of the said process of kiting checks or of the said withdrawal of the funds of the bank or any wrongful or unlawful acts of said Eidsmoe until after the said discovery of the bank examiner; that the promotion of the said Eidsmoe from the position of assistant cashier to cashier did not substantially change the duties which he performed, was not contrary to any representation or warranty made by plaintiff in its application for the bond or renewal thereof, and was not a material change in the risk and hazard insured against by the policy.

As conclusions of law the court found that the acts of

Eidsmoe constituted dishonesty and acts of omission and commission done and committed in bad faith and not through mere negligence, incompetency, or any error of judgment; that the appointment of Eidsmoe to the position of cashier without the knowledge or consent of the defendant does not constitute any defense to the action; that the plaintiff is entitled to recover of and from the defendant the sum of $10,000 with interest from January 10, 1911, to date of judgment.

The errors assigned are (1) the court erred in holding that plaintiff had no knowledge of the kiting permitted by Eidsmoe on account of which loss was sustained; (2) in not sustaining the demurrer *ore tenus* to the complaint.

For the appellant there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *Francis Bloodgood, Jr.,* and *Jackson B. Kemper,* of counsel, and oral argument by *F. S. Bloodgood.*

For the respondent there was a brief by *Kreutzer, Bird, Rosenberry & Okoneski,* and oral argument by *C. B. Bird.*

Barnes, J. 1. It is urged that the bond in this case was forfeited by reason of the fact that the employee Eidsmoe was promoted from the position of assistant cashier to that of cashier during its continuance, without notice to the defendant. The point is not well taken for two reasons. First, because the bond provides that "the employer may, at any time, transfer any and every employee for whom the company is . . . bound hereunder, from one position to another, and shift any employee about at pleasure without notice to the company, and the company shall be and remain liable to the employer." Therefore under the terms of the bond itself the plaintiff had a right to make the shift which it did without notice to the defendant. Second, the proof showed that Eidsmoe performed the same work and was intrusted with the same responsibility while he was assistant cashier that he assumed

while he was cashier, and that the change was one in name only and did not affect the character of the work done. No harm resulted to the defendant from making the change.

2. It is also insisted that the bond is a guaranty of collection and not of payment, and that therefore no recovery could be had thereon until the plaintiff had exhausted its remedies against those primarily liable.

The language of the bond is as follows: "The company covenants and agrees . . . that it will . . . pay to the employer the amount of any loss or damage that shall happen to the employer . . . through the dishonesty . . . or through any act of omission or commission of any of the employees, done or omitted in bad faith." The bond further provided that the employer should promptly give notice in writing to the company after knowledge of any loss in respect to which the liability of the defendant was claimed and should within six months furnish the company proof of such loss, and that in default thereof the liability of the company should terminate. It further provided that no action, suit, or proceeding at law or in equity should be maintained on the bond unless the same was commenced within one year from the time of making claim upon the company for the loss in respect to which such action or proceeding was brought.

The language of the covenant is that the defendant would pay to the employer the amount of any loss or damage that might happen, and not that it would pay the net amount of the loss after plaintiff had exhausted its remedies against those liable for the moneys withdrawn from the bank. This court has held that a bond of the kind involved in this case given for a money consideration has all the essential features of an insurance contract, and that it is not to be construed according to the rules of law applicable to the ordinary accommodation surety. *United Am. F. Ins. Co. v. American B. Co.* 146 Wis. 573, 131 N. W. 994. Other cases so holding are *United States F. & G. Co. v. First Nat. Bank,* 233 Ill.

475, 84 N. E. 670; *Farmers' & M. S. Bank v. United States F. & G. Co.* (S. Dak.) 133 N. W. 247; *American S. Co. v. Pauly,* 170 U. S. 133, 18 Sup. Ct. 552.

If the plaintiff were required to exhaust its remedies against Price and Eidsmoe before it could have recourse against the defendant, it might well be that it could not comply with the conditions of the bond at all, because it might not be able to enforce its remedies against these parties within the time which the bond attempts to limit for the commencement of suit thereon. It appears to be quite clear that the language of the bond gives the plaintiff an absolute right to recover its loss from the surety as soon as it occurs, and not the qualified one to recover only so much of the loss as cannot be recovered from those responsible for it. *Queenan v. Palmer,* 117 Ill. 619, 7 N. E. 470. We do not find anything in the cases of *LaRose v. Logansport Nat. Bank,* 102 Ind. 332, 1 N. E. 805; *Closson v. Billman,* 161 Ind. 610, 69 N. E. 449; or *Singer Mfg. Co. v. Littler,* 56 Iowa, 601, 9 N. W. 905, relied on by appellant, which supports its contention.

3. It is argued that the officers of the plaintiff bank had knowledge of the practice of kiting checks which was being carried on after the month of June, 1909, and might have informed the surety of such fact or might have discharged the employee in time to have prevented all loss under the bond, and that because of its failure to do either, the surety is discharged under the clause in the bond set forth in the statement of facts and defining the matters and things which it was the duty of the bank to disclose to the defendant.

The finding of the circuit court negatives actual knowledge of the practice of kiting checks after the time stated. It is true there is evidence in the case from which the court might have found that such knowledge existed, but the officers of the bank denied having such knowledge, and a finding in accordance with their testimony is fairly supported by the evidence.

4. It is further urged that an examination of the books of the plaintiff bank would disclose the practice that was being pursued, and that the officers of the bank were chargeable with knowledge of what was contained in their books, particularly inasmuch as they represented, when the application for the bond was made, that periodical examinations of the bank would be made by its officers.

The language of the bond is that the employer would notify the defendant of certain facts if the same should "come to the knowledge of the employer." We interpret this provision of the bond to mean actual knowledge and not mere constructive notice, which is a very different thing from knowledge, although in some cases its legal effect may be the same. The bond did not require the plaintiff to notify the defendant of matters of which it had knowledge and also of matters of which it might have had knowledge had its officers made a critical examination of its books from time to time.

5. It is urged that in its application for the bond the plaintiff represented that the bank would be examined about once a month by its officers and directors; that monthly meetings were had and cursory examinations were made; that plaintiff was bound to make efficient examinations from time to time, and that if such examinations had been made the cashier's default would have been discovered, and that plaintiff is precluded from recovery by reason of the negligence and carelessness of its officers in conducting their examinations.

This issue is not raised by the pleadings. Negligence is not set up as a defense in the answer, it is not made the subject of any finding by the court, and was not discussed by the court in the exhaustive opinion which it rendered in the case. The bond itself does not require any examinations to be made. If defendant wished to rely on representations made in the application for the bond, it should have so advised the other party by its pleading.

Treating the question as being properly before the court

does not affect the ultimate conclusion to be reached in the case. There was evidence strongly tending to show that the default in question could not have been discovered except by an examination of the draft register, and that while a thorough and critical examination would uncover the wrongdoing, an ordinarily careful one might not.

Mere negligence on the part of the insured which results in loss is not a defense against a fire insurance policy, but is one of the risks covered by the insurance. *Pool v. Milwaukee M. Ins. Co.* 91 Wis. 530, 540, 65 N. W. 54; *Karow v. Continental Ins. Co.* 57 Wis. 56, 62, 64, 15 N. W. 27. Neither is it a defense in an action on the bond of a surety corporation unless it is such that it amounts to fraud or bad faith. *Fidelity & D. Co. v. Courtney,* 186 U. S. 342 (22 Sup. Ct. 833) and cases cited at page 361. The case of *United States F. & G. Co. v. First Nat. Bank, supra,* is to the same effect. We think the doctrine of these cases is sound and should be followed.

6. It is next insisted that at the time the bond was applied for the officers of the plaintiff knew that the practice of kiting checks had been carried on, and that it was its duty to disclose that information in its application for the bond, and furthermore that it was its duty to inform the defendant of that fact under the clause which obligated the plaintiff to inform the defendant of any dishonest transaction in which Eidsmoe participated or of any transactions carried on by him in bad faith and not through mere negligence or error in judgment.

The court found in substance that the original transactions of Price with the bank were permitted through ignorance on Eidsmoe's part of the banking business, and were the result of an error in judgment and not of any bad faith. Eidsmoe was notified on June 12, 1909, to stop the practice which had been pursued, and he did practically stop it for a period of three months. If the acts complained of were not done in bad faith or with a dishonest purpose, no notice was required.

We are unable to say that the inference which the trial court drew from the testimony and from all of the facts and circumstances disclosed by the case is not fairly supported by the evidence, and we do not think the finding on this question of fact should be disturbed by this court.

7. It is also urged, but not very strenuously, that the last acts complained of were the result of errors and not of dishonesty or bad faith on Eidsmoe's part. The circuit court found the contrary, and this finding is clearly supported by the testimony. These transactions occurred after Eidsmoe had received direct and explicit instructions not to cash any checks given by Price on outside banks, unless he had advice from the banks on which the checks were drawn that they would be paid on presentation. There was also some testimony tending at least to show that Eidsmoe profited to some extent by permitting Price to withdraw moneys from the bank in the manner in which he did.

By the Court.—Judgment affirmed.

MENASHA WOODEN WARE COMPANY, Respondent, vs. THAYER and another, Appellants.

September 21—October 8, 1912.

Tax titles: Constructive redemption: Misinformation given by county clerk: Who may redeem: Statutes: Construction.

1. Sec. 1165, Stats. (1898), relating to redemption of land sold for taxes, should be liberally construed.
2. Although the owner of land knew that the taxes thereon for a previous year had not been paid, and had been informed by the county clerk of the amount required to redeem, yet when thereafter, within the time for redemption, his agent, to whom he had given sufficient money for the purpose, offered to redeem and was informed by the county clerk that there were no delinquent taxes, and by reason of such misinformation they were not paid, there was a constructive redemption by such owner.

[3. Whether a prospective purchaser of land under an oral agreement pursuant to which a deed had been deposited in escrow and he was to accept such deed and pay the consideration if on examination he found the title good, was within the term "other person" in sec. 1165, Stats. (1898), and had a sufficient interest in the land to entitle him to redeem from a tax sale, doubted.]

Appeal from a judgment of the circuit court for Oneida county: A. H. Reid, Circuit Judge. *Affirmed.*

Action to quiet title to the southeast quarter of the southwest quarter and the southwest quarter of the southwest quarter of section 36, township 40 north, range 2 west. From February 5, 1892, to January 16, 1900, the lands were owned in fee simple by A. B. McDonnell and Thomas Irvine, who were owners of large quantities of lands and were dealing as a partnership known as McDonnell & Irvine, of the business of which McDonnell had charge on behalf of the firm. By a deed dated December 5, 1899, but not delivered until the afternoon of January 16, 1900, they conveyed the premises to one Utz, who was acting as trustee for the plaintiff. November 10, 1902, Utz conveyed the same to plaintiff, who has since made no conveyance thereof. In 1898 the lands were duly taxed, and in May, 1899, were sold for the nonpayment of taxes, and on May 16, 1903, a tax deed in proper form was issued to the defendant *Thayer,* which was immediately put on record. In December, 1910, the defendant *Thayer* conveyed to the defendant *Tobey* a one-third interest in said tax title, and defendants claim under said tax deed and not otherwise. In December, 1899, McDonnell & Irvine made an oral agreement with plaintiff's trustee, Utz, to execute and deposit with the State Bank of Phillips, Wisconsin, their warranty deed of a large number of descriptions of lands, including those in question, with directions to deliver the same to Utz on payment of the consideration, and Utz agreed that he would accept such deed and pay the consideration if on examination he found the title good. The deed was drawn and executed by McDonnell & Irvine and deposited with the State

Bank of Phillips with directions in accordance with said oral agreement. On December 5, 1899, McDonnell knew that the taxes of 1898 on the two forties here involved were unpaid, and that the lands were sold therefor at the tax sale of 1899, and on that day McDonnell authorized and directed one Stevens, who was instrumental in bringing about the oral agreement for the sale of the lands, to redeem any outstanding taxes on the lands included in said warranty deed, and furnished him with money to do so. On December 6th McDonnell wrote to the county clerk of Price county a letter inquiring about delinquent taxes on these lands, and on the 7th he received from the county clerk a statement showing that the amount of $2.71 with interest and redemption fees were required to redeem each forty. McDonnell did not communicate to Stevens any of the information thus received nor again see him before January 16, 1900, and McDonnell took no further personal action in respect to said taxes and never thereafter learned whether the same were paid. On January 16, 1900, while McDonnell & Irvine's said deed and instructions were still with the State Bank of Phillips, one Miner, an agent of plaintiff and of Utz, fully authorized to act in the premises, went to Phillips, Wisconsin, and with said Stevens proceeded with and made an examination of the records in the register of deeds' office of Price county respecting the title to the lands described in said warranty deed, and then proceeded to the county clerk's office of said county and inquired of the county clerk whether there were any outstanding taxes against said lands. Miner had a correct list thereof, and Stevens also had a long list of descriptions of lands, including the lands described in the warranty deed. Miner read from his list to the county clerk the descriptions of lands and the county clerk turned to his records, examined and reported upon each description for each tax sale for several years preceding that date. Said list of Miner was read through for each tax sale inquired about. Neither Stevens

nor Miner personally examined the tax-sale records. The county clerk orally reported as the list was read that there were no delinquent taxes against the lands inquired about, which included the lands involved in this action. Miner had sufficient funds of his principal with which to pay any taxes which might be found delinquent on said lands, and he and said Stevens intended in good faith to pay any such delinquent taxes found at that time, and would have paid the same if any had been reported by the county clerk. Upon completing the examination Miner paid the consideration for the deed, received delivery thereof, and immediately placed it upon record. Both Miner and Stevens in good faith believed that there were no delinquent taxes against any of said lands described in said deed. Plaintiff has paid all taxes upon the lands herein involved, beginning with the tax of 1899 and continuing to this date, except that the defendants paid the tax of 1910. Neither plaintiff nor Utz nor Miner nor Stevens learned of the fact that the lands herein involved had been sold at the tax sale of 1899, nor that said tax deed thereon had been issued, until October, 1910.

The trial court held that on January 16, 1900, plaintiff had a sufficient interest in the land to entitle it to redeem, and that its offer to do so constituted a constructive redemption, and entered judgment setting aside the tax deed upon repayment of the amount for which the lands were sold for taxes, and the taxes paid by the defendants in 1910, with interest, from which judgment the defendants appealed.

For the appellants there was a brief by *Barry & Barry,* attorneys, and *A. W. Sanborn,* of counsel, and oral argument by *Mr. Sanborn* and *Mr. M. Barry.*

For the respondent there was a brief by *Holland & Lovett,* attorneys, and *Jerome R. North,* of counsel, and oral argument by *Mr. North.*

Vinje, J. From the statement of facts it appears that McDonnell, one of the owners of the lands in question, on

December 5, 1899, knew that taxes had not been paid thereon for the previous year; that he then gave one Stevens money to pay all delinquent taxes on any land in the list given him, including the lands in litigation; that he afterward wrote the county clerk and was informed of the amount required to redeem, but did not see Stevens again nor communicate to him the information received from the county clerk. Stevens went to the county clerk and informed him he desired to pay all delinquent taxes on the list of lands he had. The clerk, after examining the tax records, informed him there were no delinquent taxes. The situation shown is certainly more favorable to the owner than it would have been if McDonnell, upon receipt of the letter from the county clerk notifying him of the amount required to redeem, had personally gone to the clerk's office and offered to redeem, and had then been told by the clerk, after an inspection by the latter of the records, that there were no delinquent taxes. In such case it cannot be doubted that the owner would have a right to rely upon the last information given him by the clerk. Here the agent of the owner had no personal knowledge of the fact that the clerk had even claimed there were any taxes due, and he did not report to his principal till after the sale was made, and the latter never learned that the taxes were not paid. The facts show that the owner of the lands through his agent offered to redeem, was told by the county clerk that there were no delinquent taxes, and by reason of such misinformation they were not paid. Previous information to the effect that there are delinquent taxes does not preclude an owner from relying upon the county clerk's statement that there are none when he personally or by agent offers to pay or to redeem them. The statute of redemption, sec. 1165, Stats. (1898), which provides that "the owner or occupant of any land sold for taxes or other person may, at any time within three years from the date of the certificate of sale, redeem the same," etc., should be liberally construed. *Jones v. Collins,* 16 Wis. 594; *Karr v. Washburn,* 56 Wis. 303, 14 N. W. 189; *Lander*

v. Bromley, 79 Wis. 372, 378, 48 N. W. 594; *Begole v. Hazzard,* 81 Wis. 274, 51 N. W. 325; *Barrett v. Holmes,* 102 U. S. 651, 657. It must therefore be held upon the undisputed facts that there was a constructive redemption by the owner.

This disposition of the case renders it unnecessary to determine whether or not the prospective purchaser had a sufficient interest in the lands to entitle him to redeem. The trial court held he had, under the ruling in *Karr v. Washburn, supra,* and *Begole v. Hazzard, supra.* Such holding would seem to be an extension of the doctrine announced in those cases, and it is doubtful if any further extension thereof is justifiable.

By the Court.—Judgment affirmed.

STATE EX REL. NEACY, Respondent, vs. CITY OF MILWAUKEE and others, Appellants.

October 8—October 15, 1912.

Municipal corporations: Fixing ward boundaries: Legislative question: Equality in population: Invalid ordinance: Validation by subsequent statute: Constitutional law: Amending city charter: General or special law?

1. Substantial equality in population is the primary object sought to be attained by ch. 436, Laws of 1901, giving to the common council in cities of the first class power periodically to "redistrict, readjust and change the boundaries of wards, so that they shall be as nearly equal in population as may be;" but *quære* whether the council may not lawfully consider the growth of population and make allowance for changes which that growth is reasonably certain to produce within a very short period in the future.
2. The question of the division of a city into wards is, in general, a legislative question.
3. The legislature may by a subsequent statute cure defects or irregularities in municipal proceedings which it might have dis-

pensed with or made immaterial by prior law, and such ratification or curative effect may result by implication as well as by direct legislative act.

4. Thus, even if an ordinance passed in an attempted exercise of the power granted by ch. 436, Laws of 1901, was void when passed, because the wards were not "as nearly equal in population as may be," yet it was recognized and validated by the subsequent enactment of ch. 661, Laws of 1911, bounding assembly and senatorial districts by ward lines and expressly providing that the wards therein referred to should be the same as the wards fixed by said ordinance.

5. The act of 1911 being a general law reapportioning the state into senate, assembly, and congressional districts, the mere fact that it incidentally has the effect above stated does not bring it within the prohibition of sec. 31, art. IV, Const., against amendment of city charters by "special or private" law.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Reversed.*

This is an action in the nature of *quo warranto,* brought by a taxpayer of the city of *Milwaukee,* challenging the right to office of a number of the acting ward assessors of the city of *Milwaukee* on the ground that an ordinance passed by the city council June 20, 1911, redistricting the city, changing the boundaries of wards, and forming a number of new wards is void. The city of *Milwaukee* was joined as a defendant. If the ordinance is void it is conceded that the defendants have no right to the offices which they hold, because the assessors who were in office at the time of the passage of the redistricting ordinance would still be the lawful assessors. The law under which the redistricting ordinance was passed is ch. 436, Laws of 1901, which provides as follows:

"Section 1. The common council of all cities of the first class, organized under special charter, may by a two-thirds vote of all its members within two years after each state or United States census is taken and the result thereof as to its population is made known, redistrict, readjust and change the boundaries of wards *so that they shall be as nearly equal in population as may be,* and to that end such council may create new wards and consolidate old ones, but no ward shall

be created having a population less than eight thousand nor exceeding twenty thousand. In redistricting such cities the original numbers of the wards and their geographical outlines shall as far as possible be retained, and the wards so created and those the boundaries of which are changed shall be in as compact form as possible."

The ordinance is attacked principally because the new wards are not made as nearly equal in population as practicable by the ordinance, but run from a minimum of 9,238 to a maximum of 19,517. It is not claimed that the disparity resulted from an attempt to gain political advantage by a gerrymander, but that the city council made allowance for future growth and gave to rapidly growing outlying wards a less population than the central wards, with the expectation that the population would soon be equalized by growth. A joint demurrer to the complaint on behalf of all the defendants was overruled by the trial court, and the defendants appeal.

Daniel W. Hoan, city attorney, and *Garfield S. Canright,* assistant city attorney, for the appellants.

For the respondent there was a brief by *Miller, Mack & Fairchild,* and oral argument by *George P. Miller* and *J. G. Hardgrove.*

The decision was announced October 15, and the following opinion was filed October 29, 1912:

Winslow, C. J. A number of objections to the plaintiff's procedure are made by the demurrants which we do not find it necessary to consider. The importance of a decision upon the merits is such that it would certainly not be good administration to base a decision upon some defect in procedure when it is possible to take up and decide the vital question in the case, namely, the question of the validity of the redistricting ordinance. The importance of an early decision upon this question is greatly increased by the fact that the general

biennial election is impending, the result of which might be wholly invalidated, or at least thrown into lamentable confusion, so far as the city of *Milwaukee* is concerned, if the question of the validity of the ordinance were now to be put aside and at some later period taken up and decided adversely.

We therefore proceed at once to a consideration of the ordinance. Here also we find it unnecessary to consider a number of the questions which were vigorously presented both in the briefs and upon the oral argument.

Undoubtedly substantial equality of population is the primary object sought to be attained by the law under which the ordinance was passed, but whether the council might not lawfully consider the growth of population and make allowance for the changes which that growth was reasonably certain to produce within a very short period in the future is a question upon which we express no opinion.

There is no constitutional requirement that a city shall be divided into wards of equal population, or that it shall be divided according to population. The general question of the division of a city into wards is a legislative question, at least within limits which have not been passed in the present case.

If, therefore, it were to be admitted, for the purposes of the case, that the ordinance was void when passed because the wards created by it were not "as nearly equal in population as may be," still, if the legislature by subsequent act recognized and ratified the ordinance, it undoubtedly became valid by such legislative ratification.

This court has frequently recognized the power of the legislature to cure by subsequent legislation defects or irregularities in municipal proceedings which it might have dispensed with or made immaterial by prior law. *May v. Holdridge,* 23 Wis. 93; *Single v. Marathon Co.* 38 Wis. 363; *Cawker v. Central B. P. Co.* 133 Wis. 29, 113 N. W. 419; *State ex rel. Clancy v. McGovern,* 100 Wis. 666, 76 N. W. 593. It is also well established that such ratification or cura-

tive effect may result by implication as well as by direct legislative act. *Fisk v. Kenosha,* 26 Wis. 23; *Knapp v. Grant,* 27 Wis. 147; *Hasbrouck v. Milwaukee,* 21 Wis. 217; *Campbell v. Kenosha,* 72 U. S. 194; *Mattingly v. District of Columbia,* 97 U. S. 687; *Brown v. Mayor, etc.* 63 N. Y. 239.

By ch. 661 of the Laws of 1911, published July 17, 1911, the legislature redistricted the state for legislative purposes, divided the county of Milwaukee into nineteen assembly districts and six senatorial districts, bounded the various districts by ward lines, and distinctly provided that the wards named in the law should be construed to be the wards created by the ordinance in question.

This was beyond question a complete and unequivocal recognition and approval of the ordinance. It is argued that the act cannot be operative for this purpose for the reason that changing the ward boundaries of a city amounts to an amendment of its charter and is prohibited by sec. 31 of art. IV of the constitution. The objection falls because the constitutional provision cited only prohibits the amendment of a city charter by "special or private" law, and by no stretch of imagination can a statewide apportionment law be called either a special or private law.

So far as this case is concerned, ch. 661 of the Laws of 1911 must be considered as a valid general law. The mere fact that it incidentally affects a given locality in some of its provisions cannot logically make it a special or private law or deprive it of constitutionality.

By the Court.—Order reversed, and action remanded with directions to sustain the demurrer to the complaint.

CITY OF MONROE, Appellant, vs. ENDELMAN, Respondent.

September 18—October 29, 1912.

Peddlers: Transient merchants: License fees payable to city: Amount: Reasonableness: Power delegated to municipality: Discretion: Confiscatory ordinance.

1. The purpose of ch. 490, Laws of 1905 (secs. 1570–1584*j*, Stats.: Supp. 1906), was to regulate and tax, not to prohibit or destroy, the occupations (of peddlers, transient merchants, etc.) to which the act relates; and hence the delegation of power to municipalities to exact *per diem* fees (in addition to the license fee paid to the state) did not include the power to prohibit or destroy such occupations.
2. The provision in sec. 5 of said act (sec. 1574, Stats.: Supp. 1906) that a transient merchant "shall . . . also pay to the treasurer of any city or village where he may be conducting his business a sum not to exceed $25 per day, . . . such amount to be determined by ordinance or resolution of such city or village," is a limitation upon the maximum amount that may be demanded, and not a delegation of authority to every city and village to impose the maximum amount.
3. Such act delegates authority only to exact *reasonable per diem* fees, not exceeding the maximum stated, and in fixing such fees the size of the city or village in which the business is to be conducted, and perhaps the nature and extent of the business of the transient merchant, must be taken into consideration.
4. The discretion vested in the municipal authorities, as to fixing the *per diem* fee, is controlling so long as it is exercised within the delegated limits and purposes; but it may be restrained within those legitimate boundaries by the courts.
5. Where a transient merchant, having paid a license fee of $75 to the state, was offering at retail in a city of 4,500 inhabitants a stock of clothing worth not to exceed $3,000, and his sales averaged only $88, his gross profits about $18, and his expenses about $7 per day, an ordinance requiring him to pay to the city a *per diem* fee of $25 was confiscatory and void.

APPEAL from a judgment of the circuit court for Green county: GEORGE GRIMM, Circuit Judge. *Affirmed.*

The city of *Monroe* is the county seat of Green county, with a population of about 4,500, and is a city of the fourth

class, operating under the general charter law of the state. Three policemen are employed by it to whom it pays salaries of $75, $65, and $60 per month, respectively. For several years the rate of taxation in the city has been approximately two per cent. on the assessed valuation of all property, real and personal. On the 18th day of October, 1910, the city, pursuant to ch. 490, Laws of 1905 (secs. 1570–1584*j*, Stats.: Supp. 1906), passed an ordinance requiring all transient merchants desiring to do business therein to obtain a license and to pay therefor at the rate of $25 per day. The defendant, *Endelman,* is a nonresident of the state of Wisconsin, his home being in Columbus, Ohio. For the past ten or eleven years he has been a transient merchant. He came to the city of *Monroe* on the 23d day of July, 1911, bringing with him a stock of clothing of the value of $2,500 to $3,000. He rented a store building, for which he agreed to pay $30 per month; had two clerks to whom he paid $5 per day, and had a transient merchant's license issued to him by the state, for which he had paid $75. On the 27th day of July, 1911, the defendant offered for sale, and sold, merchandise in the city without first having obtained a local license, as required by the ordinance hereinbefore referred to. The defendant sold goods in the city of *Monroe* during the days of July 27, 28, 29, and 31, 1911. He took out a local license for each of the dates of July 28, 29, and 31 and paid under protest for each license $25. During the four days the defendant sold goods in the city his gross sales amounted to $352 or an average of $88 per day. His profits were twenty per cent. of his gross sales. His daily expense was about $7. It was then a dull time or season of the year for that class of business. The cost of issuing a license to the defendant by the city did not exceed $1. The character of the defendant's business was such that it did not require any special police protection or inspection and it was conducted and carried on by the defendant in an orderly and law-abiding manner.

The above are substantially all the facts stipulated to be the facts upon the trial of the case. The defendant was arrested for conducting the business of a transient merchant on the 27th day of July without first having paid the license or *per diem* fee of $25 as required by the city ordinance. He was brought before the police justice of the city, who found him guilty of violating the ordinance and imposed a fine of $50 and the costs of the action. The defendant then appealed to the circuit court for Green county, before which the case was tried upon the facts hereinbefore set forth. The circuit court sustained the constitutionality of ch. 490 of the Laws of 1905, but held the ordinance void on the ground that it was unreasonable and in effect prohibitory, and entered judgment in favor of the defendant, from which the plaintiff appealed.

W. H. M'Grath, for the appellant.

J. L. Sherron, for the respondent.

VINJE, J. Ch. 490, Laws of 1905 (secs. 1570–1584*j*, Stats.: Supp. 1906), is entitled "An act relating to hawkers and peddlers and various other occupations." Among the occupations therein mentioned is that of transient merchants, circuses, and exhibitions, traveling vaudeville, ferris wheel, merry-go-round, ocean wave, transient shooting gallery, the exhibition of trained or wild animals or other objects of curiosity, and that of fire-sale merchants. The constitutionality of the law, so far as its general scheme is concerned, was sustained in the case of *Servonitz v. State,* 133 Wis. 231, 113 N. W. 277. Judging merely from the title of the act, it would seem to be an exercise of the police power alone, but in view of the amount of license fee required to be paid the state and of the *per diem* fees which may be imposed by municipalities, it seems that its purpose was a dual one, namely, to regulate the trades and occupations mentioned under the exercise of the police power and to impose a reasonable tax upon such occupations and trades. It is evident, however, that the purpose

of the legislature was to regulate and tax, not to prohibit or destroy, the occupations to which the law related. Hence the delegation of power to the municipalities of the state to exact *per diem* fees did not include the power to prohibit or destroy the callings or occupations which they were empowered to regulate and tax.

Sec. 5 of the act (sec. 1574, Stats.: Supp. 1906) provides, among other things, that each transient merchant "shall . . . also pay to the treasurer, of any city or village where he may be conducting his business, a sum not to exceed twenty-five dollars per day for each day that he may be engaged in carrying on his business, such amount to be determined by ordinance or resolution of such city or village." This language must be held to be a limitation upon the maximum amount that can be demanded to be paid in any city under any circumstances, and not to be a delegation of authority to every city and village to impose the maximum amount, as is claimed by the plaintiff. The legislature was well aware of the fact that the cities and villages within the state varied greatly as to population, and that the value of carrying on the business of a transient merchant in any village or city depended quite largely on the number of inhabitants of such village or city. It is unreasonable, therefore, to suppose that the legislature intended that the smallest village in the state could lawfully fix and demand a tax equal in amount to that which the largest city in the state could impose. Such a construction of the law would enable most cities and villages to entirely suppress and prohibit the lawful callings that were intended by the legislature to be merely regulated and taxed. The naming of a maximum *per diem* fee did not absolve villages and cities from the duty of fixing reasonable *per diem* fees, taking into consideration the size of the village or city in which the business was to be conducted, and perhaps the nature and extent of the business of the transient merchant. Hence, the act must be construed to delegate to cities and vil-

lages the authority to exact *reasonable per diem* fees, which fees must in no case exceed the sum of $25 per day. Such a construction of the language quoted above harmonizes it with the evident intent and purpose of the act and places the law safely within the constitutional limits of legislative power.

The delegation of legislative power to subordinate political divisions of the state is solely for public purposes, and, when the scope and purpose of such delegated power is manifest, it must be exercised within the limits and for the purposes disclosed in the act delegating it. *Le Feber v. West Allis,* 119 Wis. 608, 97 N. W. 203.

This brings us to a consideration of the reasonableness of the ordinance. Unquestionably the discretion vested in the municipal authorities of fixing the *per diem* fee must be controlling as long as it is exercised within the delegated limits and purposes. But courts may inquire into the extent of those limits and purposes, and, if it be found that they have been manifestly exceeded by a municipal act, declare such act invalid on the ground that it is in excess of the authority granted. This leaves municipal discretion supreme within the field and for the purposes granted. Judicial control only restrains it within its legitimate boundaries. It does not supplant, limit, or modify it within such boundaries. That courts have uniformly exercised such power in this and other states may be seen by reference to the case of *Le Feber v. West Allis,* 119 Wis. 608, and cases cited on page 613 (97 N. W. 203).

The ordinance in question must be held to be void on the ground that it is confiscatory. It requires no argument to demonstrate that it is so. A mere statement of the material facts is sufficient. The defendant carried a stock of merchandise of a value not exceeding $3,000. He was offering this for sale at retail in a city containing 4,500 inhabitants. His daily sales averaged only $88. His gross profits were twenty per cent. of his sales, and his daily expenses about $7.

The $25 *per diem* fee would alone more than consume his gross profits. Tested in another way, it appears that if he continued in business in *Monroe* for a year he would pay in fees over $7,500 on a stock of merchandise the average value of which did not exceed $3,000. Obviously such a tax would confiscate defendant's whole property long before the year expired. Similar ordinances have invariably been held to be confiscatory and therefore void. *Carrollton v. Bazzette,* 159 Ill. 284, 42 N. E. 837; *Ottumwa v. Zekind,* 95 Iowa, 622, 64 N. W. 646; *Chaddock v. Day,* 75 Mich. 527, 42 N. W. 977; *Brooks v. Mangan,* 86 Mich. 576, 49 N. W. 633; *Peoria v. Gugenheim,* 61 Ill. App. 374; *Sipe v. Murphy,* 49 Ohio St. 536; *Ex parte Eaglesfield,* 180 Fed. 558.

It is true that cases may be found in which it has been held that a calling or business may be entirely prohibited by the imposition of such a tax or regulatory fee as is sufficient to prevent the business from being carried on with profit, but such cases relate to businesses or callings that are more or less injurious to society and which, therefore, may be entirely suppressed by means of license fees or regulations. The business of the defendant was a lawful one, not injurious but beneficial to society, and does not fall under the class just mentioned where prohibitory ordinances have been upheld.

By the Court.—Judgment affirmed.

AMERICAN CAN COMPANY, Respondent, vs. STARE and others, Appellants.

September 18—October 29, 1912.

Pleading: Joinder of causes of action: Mortgages: Foreclosure: Asking for deficiency judgment.

A complaint asking foreclosure of real-estate mortgages and of a pledge of personal property, all given to secure payment of a promissory note, and asking also for judgment for the deficiency, if any, after sale of the mortgaged and pledged property, states but a single cause of action. An intimation in *Plankinton v. Hildebrand*, 89 Wis. 209, that in an action to foreclose a real-estate mortgage, where a deficiency judgment is asked, two causes of action are united, is disapproved.

APPEAL from an order of the county court of Waukesha county: DAVID W. AGNEW, Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *Tullar & Lockney,* and for the respondent on that of *Merton, Newbury & Jacobson.*

BARNES, J. This action is brought to foreclose two real-estate mortgages executed by the defendants *Frank T. Stare* and *Frances F.,* his wife, given to secure the payment of a note for $20,000 signed by the defendants *Frank T. Stare* and *Charles S. Crary,* and also to foreclose a pledge of certain certificates of corporate stock deposited with the plaintiff as collateral security for the payment of said note by the defendant *Frank T. Stare.* The facts are all set forth in a single count in the complaint, and the plaintiff asks that the pledged personal property and the mortgaged real estate be sold to satisfy its debt and that it have judgment for deficiency against the makers of the note if the property pledged and mortgaged is insufficient to pay the amount due on the note with interest and costs. The defendants demurred to the complaint on the ground that two or more causes of action

were improperly united, and from an order overruling such demurrer they appeal.

The complaint states but a single cause of action. The giving of the note and the real-estate mortgages and the pledging of the personal property occurred at the same time and as part of the same transaction. The purpose of the plaintiff's suit is to collect the $20,000 note which it holds. The fact that it has securities which it seeks to subject to the payment of the debt does not create any additional cause of action. The securities are auxiliary aids or adjuncts which enable the plaintiff to collect its debt. They afford the plaintiff a right which it would not have if no security had been given.

A cause of action consists of the facts from which plaintiff's primary right and the defendant's corresponding duty have arisen, together with the facts showing defendant's wrong. *McArthur v. Moffet,* 143 Wis. 564, 571, 128 N. W. 445.

"The test of whether there is more than one cause of action stated in a complaint is not whether there are different kinds of relief prayed for or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication." *South Bend C. P. Co. v. Geo. C. Cribb Co.* 105 Wis. 443, 446, 81 N. W. 675; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; *Herman v. Felthousen,* 114 Wis. 423, 90 N. W. 432.

The fact that the plaintiff in endeavoring to enforce the primary right denied "prays for full relief, combining several elements or objects, does not render the complaint open to demurrer on the ground of multifariousness." *South Bend C. P. Co. v. Geo. C. Cribb Co., supra.*

The test of whether there is more than one cause of action stated in a complaint in an equitable action is whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication. *Zinc C. Co. v. First Nat. Bank,* 103 Wis. 125, 79 N. W. 229.

A complaint for an accounting and for the recovery of the

amount of money found to be due on such accounting which involves numerous items of property for which the defendant is sought to be charged, which items of property came into the control of the defendant in different ways, some by fraud and others innocently, and which seeks a rescission of certain conveyances of land and the return of the ostensible title to the plaintiff, sets forth but a single cause of action, the different kinds of relief sought being simply necessary adjuncts to the main purpose of compelling an accounting for that which the defendant wrongfully detains. *Somervaill v. McDermott,* 116 Wis. 504, 509, 93 N. W. 553.

In the instant case the relief sought by way of selling the mortgaged and pledged property to extinguish in whole or in part the debt is germane and auxiliary to the single purpose of the action, which is to collect the debt evidenced by the note in suit.

There is language used in *Plankinton v. Hildebrand,* 89 Wis. 209, 61 N. W. 839, which might be fairly understood as holding that in every action to foreclose a real-estate mortgage where a deficiency judgment is asked for, there are two causes of action united, one in equity to foreclose the mortgage and one at law for a money judgment. This statement was made *arguendo* and was not necessary to a decision of the case. The statute (sec. 3156, Stats. 1898) which permits a demand for a deficiency judgment in foreclosure actions contains no intimation that an additional cause of action is thereby created. On the other hand, it would appear to be quite plain that the statute merely intended to afford additional relief in the foreclosure action. The intimation in *Plankinton v. Hildebrand,* above referred to, is disapproved.

By the Court.—The order appealed from is affirmed.

CLANCY, Respondent, vs. BOARD OF FIRE AND POLICE COMMISSIONERS OF MILWAUKEE and others, Appellants.

October 8—October 29, 1912.

Remedies: When exclusive: Appeal: Right is statutory: Officers: Removal: Fire and police commissioners: Review of order by circuit court: Constitutional law: Courts: Power to remove administrative officer: Statutes: Construction.

1. When the law creates a new remedy to meet a new situation, such remedy is exclusive and is subject to the conditions and limitations imposed by the legislature.
2. The right of appeal is purely statutory, and if not given is withheld.
3. The provisions of sec. 959—46*d*, Stats. (Laws of 1911, ch. 536), relating to actions brought in circuit court to review orders of the board of fire and police commissioners in a city of the first class, discharging or suspending officers or members of such departments, clearly indicate an intent that the proceeding should be finally closed by the decision of the circuit court; hence no appeal lies from its judgment to the supreme court.

[4. Whether, under our state constitution, the power to remove administrative officers may be vested in courts or judges, not determined.]

5. Considering together the provisions of subsecs. 19, 20, and 21 of said sec. 959—46*d*, Stats., it is plain that the legislative purpose was to require the board not only to decide whether the charges are sustained, but to make a decision which is reasonable under the evidence taken; and the review of its order by the circuit court is for the purpose of deciding, not whether the officer was in fact guilty or whether the court would decide the same way upon the evidence, but whether the board has performed its statutory duty of making a reasonable decision.
6. Thus considered, the action for a review by the circuit court performs substantially the functions of the writ of *certiorari*, and the court therein neither removes an officer nor extends his term of office, but merely exercises the power of supervisory control over inferior tribunals which the constitution vests in the circuit courts.
7. The provision in the last clause of subsec. 21 of said sec. 959—46*d*, Stats., that the court may require the board to make a further return and also "to take further and additional testi-

mony and make return thereof," does not authorize the court to decide the case on testimony which has never been considered by the board, but is to be construed as requiring the board to consider the new evidence taken and to return with it their decision in the light of such additional evidence.

8. The different parts of a statute should be so construed as to harmonize with its dominant purpose, unless unequivocal words compel a different construction.

APPEAL from a judgment of the circuit court for Milwaukee county: JAMES WICKHAM, Judge. *Dismissed. Appellants' motion for the issuance of a writ of* certiorari *denied.*

Daniel W. Hoan, for the appellants, as to the right of appeal contended that an appeal is given from judgments in all forms of action, and that the statute does not confer a new right but merely changes the practice. *Hixon v. Oneida Co.* 82 Wis. 515, 52 N. W. 445; *Howland v. Needham,* 10 Wis. 495; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905; *Mitchell v. Kennedy,* 1 Wis. 511; *Western Union R. Co. v. Dickson,* 30 Wis. 389; *State ex rel. Milwaukee Med. Coll. v. Chittenden,* 127 Wis. 468, 107 N. W. 500; *State ex rel. Gill v. Watertown,* 9 Wis. 254; *State ex rel. Starkweather v. Superior,* 90 Wis. 612, 64 N. W. 304; *Arnet v. Milwaukee M. M. Ins. Co.* 22 Wis. 516; *Milwaukee v. Weiss,* 93 Wis. 653, 68 N. W. 390. As to the constitutionality of the statutory provisions for review of the board's decision by the circuit court, he cited, among other authorities, *State ex rel. Davern v. Rose,* 140 Wis. 360, 122 N. W. 751; *Nehrling v. State ex rel. Thal,* 112 Wis. 637, 88 N. W. 610; 2 Dillon, Mun. Corp. (5th ed.) 784; *Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Commission,* 136 Wis. 146, 116 N. W. 905; *State ex rel. People's L. & M. Co. v. Holt,* 132 Wis. 131, 111 N. W. 1106; *State ex rel. Kennedy v. McGarry,* 21 Wis. 496; *State ex rel. Wagner v. Dahl,* 140 Wis. 301, 122 N. W. 748; *Denny v. Des Moines Co.* 143 Iowa, 466, 121 N. W. 1066; *Avery v. Studley,* 74 Conn. 272, 50 Atl. 752; *Johannes v. Thayer Co.* 83 Neb. 689, 120 N. W.

176; *Att'y Gen. ex rel. Taylor v. Brown,* 1 Wis. 442; *State ex rel. Hamilton v. Krez,* 88 Wis. 135, 59 N. W. 593; *Cole v. Black River Falls,* 57 Wis. 110, 14 N. W. 906; *O'Connor v. Fond du Lac,* 109 Wis. 253, 85 N. W. 327; *State ex rel. Harley v. Lindemann,* 132 Wis. 47, 111 N. W. 214; *Robey v. Prince George's Co.* 92 Md. 150, 48 Atl. 48; *Appeal of Norwalk St. R. Co.* 69 Conn. 576, 37 Atl. 1080.

For the respondent there were briefs by *Thomas H. Dorr, Norman L. Baker,* and *W. J. Zimmers,* and oral argument by *Mr. Baker.* Upon the constitutional question raised by appellants they cited *State ex rel. Wagner v. Dahl,* 140 Wis. 301, 122 N. W. 748; *State ex rel. Hart v. Duluth,* 53 Minn. 238, 55 N. W. 118; *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048; *State ex rel. Durner v. Huegin,* 110 Wis. 189, 85 N. W. 1046; *State ex rel. Gill v. Watertown,* 9 Wis. 254; *Mt. Clemens v. Macomb Circuit Judge,* 119 Mich. 293, 77 N. W. 936, and other cases. They also contended that if the portions of the act attacked are held unconstitutional, then the whole act is void and the entire proceeding without authority of law.

Winslow, C. J. *Thomas A. Clancy,* chief of the fire department of the city of *Milwaukee,* was removed from office by the *Board of Fire and Police Commissioners of Milwaukee* after trial upon charges as provided by subsec. 19 of sec. 959–46*d,* Stats. (Laws of 1911, ch. 586). He thereupon brought action in the circuit court for Milwaukee county against the board to reverse their decision, as provided by subsecs. 20 and 21 of the same law, and upon trial thereof the circuit court reversed the judgment of removal, and the commissioners appealed to this court from such judgment of reversal. The respondent now moves to dismiss the appeal to this court on the ground that no appeal from the judgment of the circuit court is provided for by the law. The appellants, while contesting the motion to dismiss, make a motion

for the issuance (in the event of a dismissal of the appeal) of a writ of *certiorari* out of this court directed to the circuit court for the purpose of reviewing the judgment, claiming that the circuit court had no jurisdiction because of the unconstitutionality of the act aforesaid.

It seems to us quite clear that no appeal lies from the decision of the circuit court.

The law creates a new remedy to meet a new situation. The principle is familiar that under such circumstances the remedy is exclusive and is subject to the conditions and limitations which legislative wisdom has seen fit to throw around it. *State ex rel. Cook v. Houser,* 122 Wis. 534 (see p. 595), 100 N. W. 964. The right of appeal is purely statutory, and unless given it is withheld. *Puffer v. Welch,* 141 Wis. 304, 124 N. W. 406.

It is true that our statutes in general terms authorize appeals from judgments in actions in the circuit court, and that the present proceeding is expressly termed an action in the law which creates it.

Examination of the provisions of the law, however, seems to indicate very conclusively that no appeal to this court was contemplated. In the first place, nothing is said about any such appeal, and this is the more significant because upon examination of somewhat similar laws giving to circuit courts the right of review of the decisions of special tribunals, we find special provisions for appeal to this court industriously inserted. Railroad Commission Law: Laws of 1905, ch. 362, sec. 16 (sec. 1797—16, Stats.: Supp. 1906); Public Utilities Law: Laws of 1907, ch. 499 (secs. 1797*m*—1 to 1797*m*—109, Stats.), sec. 1797*m*—69. See, also, secs. 1849, 1379—36, and 1299*f*, Stats. (1898), governing condemnation proceedings for railroad, drainage, and highway purposes.

Much stronger than this mere negative inference, however, is the inference necessarily to be drawn from the positive provisions of the law itself.

Subsec. 22 provides that if the decision of the board is reversed by the court the discharged man shall be *at once reinstated* in his position and entitled to his pay as if never discharged, and that if the decision of the board be sustained the order of discharge shall be *final and conclusive* in all cases.

The purpose to absolutely terminate the proceeding with the decision of the circuit court seems here very certain.

Doubtless the probable demoralizing effect on the public service of long-drawn-out proceedings, during which time no permanent appointment could be made, was fully appreciated. Every clause of the law indicates the intention to make the entire proceeding as speedy as possible and yet give the accused person the right to fully make his defense, and in view of the very significant provisions of the section last cited we entertain no doubt that the statute means, and was intended to mean, that the proceeding should be finally closed by the decision of the circuit court. It follows that the appeal will be dismissed.

As to the motion for the issuance of a writ of *certiorari,* different considerations arise.

The appellants' contention is that the removal of such officers is purely an administrative or executive function and in no sense judicial, and cannot under the constitution be vested in the courts; that the law in hand practically gives to the circuit court the power of removal, and hence is unconstitutional.

We do not find it necessary to decide the question whether the power of removal of local officers is a function which can constitutionally be vested in the courts. Counsel urge that this question was decided in the negative by the case of *State ex rel. Davern v. Rose,* 140 Wis. 360, 122 N. W. 751, but an examination of that case shows that the question there presented was an entirely different one, and has only a remote bearing on the present case, if indeed it has any bearing at all.

For many years the statutes of this state have provided for the removal of certain administrative officers by judges of courts of record, and we are not aware that the constitutionality of these provisions has ever been attacked. Circuit judges are authorized to remove the clerk of the circuit court (sec. 973, Stats. 1898), the county superintendent of schools (sec. 975), and town officers (sec. 976). County judges are empowered to remove all school district officers (sec. 507). Circuit judges are also empowered to remove jury commissioners (sec. 2533*a*), and there may be other instances.

However, we intimate no opinion upon the question. We do not consider that the law before us places the power of removal in the hands of the circuit court under any reasonable construction of its provisions.

Subsec. 19 of the law provides for a hearing upon verified charges, and further provides that the board shall decide by majority votes whether the charges are sustained, and if sustained shall at once determine whether the accused shall be removed, suspended from office temporarily, or reduced in rank. Subsecs. 20 and 21 provide for the commencement of an action such as the present by the removed officer against the commissioners in the circuit court, for the purpose of reversing the decision, and that the same shall be tried by the court without a jury upon the evidence returned by the board. Upon this retrial the only question to be reviewed by the court is the question, "Under the evidence was the decision of the board reasonable?" Sec. 21 further provides that the court may require a further or additional return to be made, and may also require the board "to take further and additional testimony and make return thereof."

Taking the two sections together, it is plain that the legislative purpose was to require the board not only to decide whether the charges are sustained, but to make a decision which is reasonable under the evidence taken. The object

evidently was to require that the decision should not be whimsical, capricious, or merely partisan, but a decision founded on some rational view of the evidence.

It is equally plain, we think, that the legislative idea further was that, as a further safeguard against purely partisan decisions or predetermined decisions founded on no substantial grounds, the circuit court should have power to summarily review the trial and decision, not for the purpose of deciding whether the officer was in fact guilty of the charges made, or whether the court would decide the same way upon the evidence, but simply whether the board had performed its statutory duty and made a reasonable decision upon the evidence, *i. e.* had acted not necessarily wisely but as reasonable men upon the evidence placed before them.

In substance this appeal was intended to perform the functions of a writ of *certiorari* in a case where the writ is directed to a tribunal of this nature, namely, to review the evidence to ascertain only whether there was reasonable ground for the decision made. *State ex rel. N. C. Foster L. Co. v. Williams,* 123 Wis. 61, 100 N. W. 1048. It is a method provided by statute by which the power of superintending control which is vested in the circuit courts by the constitution is to be exercised.

The constitution (art. VII, sec. 8) provides that the circuit courts shall have a supervisory control over all inferior courts and tribunals and shall have power "to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari, and all other writs* necessary to carry into effect their orders, judgments and decrees, and give them a general control over inferior courts and jurisdictions."

While no formal writ issues in the present case and the proceeding is termed an appeal, it accomplishes the same result as though it had been commenced by the issuance of the ancient writ, and there can be no doubt of the legislative power to reach the desired end by procedure termed an appeal as

well as by an original common-law writ. It is true that by the last clause of subsec. 21 it is provided that the court may require the board to make a further return and also "to take further and additional testimony and make return thereof." The appellants claim that this clause authorizes the circuit court to try and decide the case on testimony which has never been considered by the board, and thus that in such cases the court is authorized to pass *de novo* upon the question as to whether the accused is guilty or not.

We do not so construe the clause in question. It is true that there is no specific provision that the board shall consider the additional testimony, but that seems to us to be the only construction which fully harmonizes the clause with the general purpose of the other provisions regulating the appeal. That general purpose, as before said in this opinion, is clearly not to make the court a trier of the facts, but simply a trier of the question whether the board has acted reasonably on the evidence before them. To so construe the law as to permit the court to pass upon the question of guilt as an original question upon evidence never considered by the board would subvert its dominant purpose and should not be done unless unequivocal words require such construction. We do not think that such a case is presented here. While the law does not expressly say that the board shall report whether their decision remains the same as before or not, it requires that they make a return, and we construe this as meaning not only that they send up the evidence, but also return therewith their decision in the light of the additional evidence. If this were not the intention it would certainly be absurd to require the board to formally meet for the sole purpose of taking additional testimony when the same could be at once taken by the court itself, or by a single officer authorized to take depositions with far greater dispatch and far less trouble.

The conclusions reached demonstrate that in acting under this statute the court neither removes an officer nor extends

his term of office,—it simply decides whether the board has performed the duty imposed on it by the statute. This question is purely judicial. There is no ground for a claim that the provisions attacked are unconstitutional.

By the Court.—Upon the respondent's motion the appeal is dismissed with costs; appellants' motion for the issuance of a writ of *certiorari* is denied without costs.

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ABORTION. See EVIDENCE, 1–3. INSTRUCTIONS TO JURY, 3.

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Where two persons close an accord and satisfaction by a contractual receipt in writing, it cannot be varied, contradicted, or explained by verbal evidence. *Richtman v. Watson,* 385

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By whom brought: Who may maintain. See STATE TREASURER, 2.

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Joinder of causes of action.

A complaint asking foreclosure of real-estate mortgages and of a pledge of personal property, all given to secure payment of a promissory note, and asking also for judgment for the deficiency, if any, after sale of the mortgaged and pledged property, states but a single cause of action. An intimation in *Plankinton v. Hildebrand,* 89 Wis. 209, that in an action to foreclose a real-estate mortgage, where a deficiency judgment is asked, two causes of action are united, is disapproved. *American Can Co. v. Stare,* 627

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APPEAL AND ERROR.

Right to appeal: Decisions reviewable.

1. The right of appeal is purely statutory, and if not given is withheld. *Clancy v. Fire and Police Commissioners,* 630

2. The provisions of sec. 959—46*d*, Stats. (Laws of 1911, ch. 586), relating to actions brought in circuit court to review orders of the board of fire and police commissioners in a city of the first class, discharging or suspending officers or members of such departments, clearly indicate an intent that the proceeding should be finally closed by the decision of the circuit court; hence no appeal lies from its judgment to the supreme court. *Ibid.*

Exceptions: Sufficiency.

3. A general exception to the entire charge, much of which is unexceptionable, or an omnibus exception to the refusal to give numerous requested instructions, some of which were plainly inapplicable to the issues, is not available on appeal. *Haueter v. Marty,* 490

Bill of exceptions. See APPEAL, 14.

Time for taking appeal. See APPEAL, 18–21.

Assignment of errors. See APPEAL, 4, 8.

Briefs. See APPEAL, 8.

4. A brief assigning error upon the refusal to instruct as requested and upon the giving of portions of the charge, referring to pages in the printed case, but not giving the portions of the charge excepted to or the substance thereof, and not stating the principles of law applicable thereto, is not a compliance with Supreme Court Rule 10. *Bilgrien v. Ulrich,* 532

Review: Presumptions. See CARRIERS, 8.

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5. If the overruling of a demurrer *ore tenus* in this case was error it is not ground for reversal, the complaint having been formally amended to meet the supposed defect at the close of the

plaintiff's case, and defendants not having been misled or prejudiced. *Klundt v. Keller*, 290

6. Inaccuracy in the form of a question put to a witness is not a prejudicial error where it is apparent that the witness understood and answered it in the proper sense. *Garton Toy Co. v. Buswell Lumber & Mfg. Co.* 341

7. Computation of damages upon an incorrect basis is not a material error if the result is as favorable to the appellant as the result of a proper computation would have been. *Ibid.*

Determination and disposition of cause: Decision in general.

8. Upon appeal, this court considers not only the questions arising upon the assignments of errors, but also, under sec. 3071, Stats. (1898), what disposition shall be made of the cause if any of such assignments are sustained; and counsel should present facts or argument, based upon the record, which might guide the court in the matter of such disposition. *Monahan v. Fairbanks-Morse Mfg. Co.* 512

Same: Mandate on reversal. See DAMAGES, 2. EXECUTORS AND ADMINISTRATORS, 14. MUNICIPAL CORPORATIONS, 12.

9. When this court, upon a reversal, can best promote justice by giving such precise directions as to the proper judgment to be rendered as will speedily terminate the litigation it will do so. *Will of Rice: Cowie v. Strohmeyer*, 401

10. Where the whole history of an entire subject matter, including a dominant feature and many others subsidiary or germane thereto, in the entirety affecting many persons who are parties, or may properly be made so, and the controversy, in general, is opened by a reversal on appeal to this court, the broad superintending control power, supplementing appellate jurisdiction, affords the court ample opportunity to give the full directions suggested in the last foregoing. *Ibid.*

11. Omission of the trial court in this case to make any finding upon the issue as to whether there had been an accord and satisfaction was a failure to comply with sec. 2863, Stats. (1898); but, there being a clear preponderance of the evidence to the effect that the parties had settled all of their differences arising out of the contract in suit, the supreme court, instead of ordering a new trial, directs a judgment dismissing the complaint. *Kelm v. Woodbury*, 499

Same: Conclusiveness.

12. The mandate of this court is conclusive upon both parties, not only as to matters actually presented to this court upon the appeal, but also as to all other matters which, consistently with legal rules, might have been presented; and where it directs the entry of final judgment by the court below there can ordinarily be no other or further proceedings in that court than to enter the judgment directed. *Monahan v. Fairbanks-Morse Mfg. Co.* 512

13. Where, in an action based on negligence, a special verdict found in plaintiff's favor upon all issues, but the trial court changed one answer therein so as to make it a finding of contributory negligence, and upon the verdict so changed granted judgment for the defendant, and on appeal by the plaintiff such judgment was reversed and the cause remanded with direction to restore

the answer which had been changed and to render judgment for plaintiff for the damages found, the defendant could not thereafter, upon a new appeal, urge that the damages were excessive or that the trial court had erred in its rulings or instructions. *Ibid.*

14. Since in such case a new appeal by defendant would be futile, there was no error in refusing to permit him to amend the bill of exceptions or to settle a new one for the purposes of such an appeal. *Ibid.*

Appeal from county court: Parties.

15. In an appeal from a final order settling an executor's account, all persons adversely interested may be brought in and the proceedings organized as an equitable action to settle the dominant controversy and all others germane thereto; the persons appearing being arranged as plaintiffs or defendants according to their actual attitude, as near as practicable. *Will of Rice: Cowie v. Strohmeyer,* 401

16. In the situation last stated persons who have wrongfully possessed themselves of portions of the trust fund may be brought in and appropriate redress afforded. *Ibid.*

17. On a general appeal from the final judgment in the settlement of an estate in county court, the circuit court becomes possessed of the whole subject matter involved in such order and may make all persons parties necessary to a final settlement or who should be present for their due protection, and the issues cannot be so narrowed by pleading or consent as to interfere with judicial competency as to the parties under disability, to decide any matter required by the evidence to be decided to fully redress the dominant wrong and all others subsidiary or germane thereto. *Ibid.*

Same: Time for taking appeal.

18. In case of probate proceedings had in due course for the distinct purpose of determining the amount to be allowed to an executor as counsel fees and an order being minuted on the court journal intended to finally close the matter, the right of appeal commences to run from that date. *Will of Rice: Cowie v. Strohmeyer,* 401

19. The rule last stated does not apply to a presentment involving jurisdictional error or extra-judicial elements indicating that the determination was not a final judicial determination of the judicial questions or a mere preliminary determination to be followed by a final order. *Ibid.*

20. Time for appealing from a final determination in county court, made in due course in the administration of an estate, dates from such determination whether embodied in a formal order or merely minuted upon the court journal. *Ibid.*

21. A court memorandum, made in a hearing, on application for settlement of an executor's final account and preliminary to the final order, as to the amount to be allowed for attorneys' fees and compensation of guardians *ad litem*, does not set time running to appeal from an allowance in harmony therewith by such final order. *Ibid.*

Same: Questions considered. See WILLS, 10.

Appeal from civil court of Milwaukee county.

22. Under ch. 549, Laws of 1909, as amended by ch. 425, Laws of 1911, appeals from the civil court of Milwaukee county are governed by the statutes relating to appeals from justices' courts, except that the returns and amended returns upon appeal are to be made by the clerk; but the notice of appeal and affidavit of good faith must be served upon the civil judge. *Fred Miller Brewing Co. v. Milwaukee,* 336

23. In subd. 2 of sec. 14, ch. 549, Laws of 1909, as amended, relating to "the practice, pleadings, trials, judgments and proceedings thereafter" in certain cases, the words "proceedings thereafter" refer to proceedings for the enforcement of the judgment or in conformity with the judgment, as distinguished from "proceedings upon . . . appeal," which have reference to proceedings adverse to the judgment. *Ibid.*

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BAILMENT.

1. In case of a bailment for hire, in general, the bailee is liable only for the exercise of ordinary care,—he is in no sense an insurer. *Firemen's Fund Ins. Co. v. Schreiber,* 42

2. The measure of care called for by the foregoing rule is such as men, in general, of common prudence ordinarily bestow upon their own property similarly situated. *Ibid.*

3. A contract of bailment, in the absence of special situations to the contrary, involves, by necessary inference, an understanding that the bailee may use the usual means of executing the agreement. *Ibid.*

4. The rule, last stated, includes the privilege of employing assistants and delegating the work, in whole or in part, to them, being responsible for their conduct while acting within the scope of their employment and performing the duty of the principal. *Ibid.*

5. The principal, in the circumstances of the last foregoing, is not an insurer as to the conduct of his employee. He is responsible for ordinary care in the selection of his agents, ordinary care as regards retaining them in his employ, and responsible, *respondeat superior,* for all negligences and wrongful acts of the agent within the scope of the employment in the execution of the contract of bailment. *Ibid.*

6. The rule may be stated, as commonly, thus: The master is liable for all acts of his servant while engaged in his master's business within the scope of such servant's authority in further-

ance of such business; but, if he steps aside therefrom and proceeds to serve some purpose of his own, the master is not liable. *Ibid.*

BANKS AND BANKING. See INSURANCE, 15, 17–20.

BILL OF EXCEPTIONS. See APPEAL, 14.

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BILLS AND NOTES.

Proof of ownership: Possession.

1. Mere naked possession of negotiable paper payable to order and not indorsed does not establish title thereto or prove or tend to prove a transfer to such possessor. *Swanby v. Northern State Bank,* 572

Holder in due course.

2. The rights of a bank as owner in due course of a note purchased by it are not prejudiced by the sending of a notice to the maker stating that the note is at the bank "for collection." *Bank of Baraboo v. Laird,* 243

BONDS.

See COUNTIES, 3, 6. EXECUTORS AND ADMINISTRATORS, 1, 2. INSURANCE, 15–20. MUNICIPAL CORPORATIONS, 6–12. STATE TREASURER, 1, 2.

1. Before paying a commission to their agent for selling a stallion, plaintiffs required from him a bond for repayment thereof, conditioned that the sale was valid and binding, that the note received for the price should be paid when due, and if not that the agent should pay back the amount paid to him. *Held,* that upon breach of the conditions plaintiffs might recover on the bond, even though at the time of giving it the agent had told them of facts going to show the sale and note invalid, and even though they had sold the note to another person. *Klundt v. Keller,* 290
2. Where the sale of a stallion to a number of farmers is not to be effective unless fifteen shares be taken by purchasers, such shares must be taken in good faith, and the purchase of shares by mere stool pigeons to whom the seller himself furnishes the money therefor vitiates the whole transaction. *Ibid.*

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BY-LAWS. See CORPORATIONS, 1, 2. INSURANCE, 2, 3, 10–14.

CARRIERS.

Carriage of goods: Delivery by carrier. See WITNESSES, 1, 2.

1. Proof of delivery of a box of goods to the initial carrier in good condition and defendant's admission in its answer that it received the same as a connecting carrier, together with evidence that it was delivered by defendant at plaintiff's residence in

his wife's absence, and that on her return she found it in an empty condition and bearing evidence that some of the boards had been removed and replaced, is *held* to make a sufficient *prima facie* showing of defendant's failure to deliver the goods. *Tradewell v. Chicago & N. W. R. Co.* 259

2. The general rule is that the right of action for failure of a carrier to deliver goods received for transportation is *prima facie* in the consignee. *Ibid.*

Same: Connecting carriers. See CARRIERS, 1.

3. The federal statute (34 U. S. Stats. at Large, 595, ch. 3591) which gives a right of action, in all cases of through shipments, against the initial carrier, does not take away the right of action theretofore existing against a connecting carrier. *Tradewell v. Chicago & N. W. R. Co.* 259

Same: Demurrage charges: Recovery back: Voluntary payment.

4. Under a rule of a railway company providing that when delivery of freight on a designated carload delivery track or private siding could not be made on account of such track being fully occupied, or for any other reason beyond its control, delivery should be made at the nearest available point, demurrage could not be charged until the free time for unloading had elapsed after the car was placed at the nearest available point where it could be unloaded, and, perhaps, notice given to the consignee. *Wooley v. Chicago & N. W. R. Co.* 183

5. A rule that "cars for unloading shall be considered placed when such cars are held awaiting orders from consignors or consignees," does not apply to the case of cars which by contract are to be unloaded on a designated carload delivery track, and which for some reason cannot be delivered there, but applies to cases where the carrier is ready to make delivery and the consignor or consignee neglects or refuses to designate the place where delivery is desired. *Ibid.*

6. Proof that consignees of paving materials, on being offered the use of any available tracks for the purpose of unloading, replied that they "wanted the cars placed as soon as possible to work so that they could unload and avoid teaming expense," does not show refusal on their part to accept delivery on any track except one previously designated. *Ibid.*

7. The fact that plaintiffs were in urgent need of money due them on a paving contract from a railway company, and that the latter refused to pay a sum of over $6,000, so due, until a disputed bill of $434 for demurrage was settled, would not be sufficient to establish duress in the payment of such demurrage charge. *Ibid.*

8. Where, however, the evidence was such that the jury might have found that such payment was made upon the understanding that the matter would be subject to investigation and to readjustment in case of error, the supreme court will not reverse a judgment in favor of the contractor because of an erroneous finding of duress by the jury, but will, in support of the judgment, presume a finding by the court in accordance with such evidence. *Ibid.*

[9. Whether or not, since the enactment of ch. 362, Laws of 1905, voluntary payment is a defense to a claim to recover a wrongful or excess charge exacted for demurrage, not decided.] *Ibid.*

Same: Contract limiting liability: Agreed valuation.

10. It is competent for a shipper and a railway company to agree upon a valuation in case of injury, in consideration for which agreement the railroad company accepts a lower rate of freight than it would otherwise be entitled to; and in such case a recovery by the shipper for an injury resulting from ordinary negligence should be limited to the amount agreed upon. *Willard v. Chicago & N. W. R. Co.* 234

11. In the absence of evidence to the contrary, a drover in charge of a shipment of horses has authority to enter into a contract fixing the value of the animals shipped and limiting the maximum liability of the carrier to such valuation. *Ibid.*

12. Upon a shipment of goods by plaintiff's wife as his agent a bill of lading was delivered to her containing the entry "Rel. val. $10," meaning that the value was limited to $10 per hundred pounds. As soon as she discovered this clause written therein she sent her brother to the office of the carrier to have the value placed at $100, but the latter's agent said it was unnecessary. *Held*, that there was no agreement limiting the value to $10, and plaintiff was entitled to recover $85, the real value of the goods. *Tradewell v. Chicago & N. W. R. Co.* 259

Same: Gross negligence.

13. Evidence that horses shipped by plaintiff on the defendant's railway were placed in a box car which was switched upon a sidetrack, and that thereafter another car was pushed in upon such track and against the car containing the horses with sufficient violence to cause it to collide with a third car standing a few feet away, breaking the halters of the horses and throwing them down or upon their haunches, does not show gross negligence on the part of defendant, there being nothing to show that the manner of switching the second car and the consequences thereof were not the result either of pure accident or of that inadvertence which amounts to ordinary negligence only. The question of gross negligence should, therefore, not have been submitted to the jury. *Willard v. Chicago & N. W. R. Co.* 234

Carriage of passengers. See RAILROADS, 1.

CERTIORARI. See SCHOOLS AND SCHOOL DISTRICTS, 1, 3, 4.

CHAMPERTY AND MAINTENANCE. See TAX TITLES, 9.

CHANGE OF VENUE. See VENUE.

CHARITABLE TRUSTS. See TRUSTS AND TRUSTEES, 1–4.

CHECKS. See TAX TITLES, 5. TRIAL, 4.

CIRCUIT COURTS. See APPEAL, 2, 15–23. OFFICERS, 2, 3.

CIVIL COURT OF MILWAUKEE COUNTY. See APPEAL, 22, 23.

CLASSIFICATION. See TAXATION, 2, 4, 5.

COGNOVIT. See CORPORATIONS, 5–9.

COLLATERAL ATTACK. See JUDGMENT, 1.

COMMERCIAL PAPER. See BILLS AND NOTES. CORPORATIONS, 5. TAX TITLES, 5. TRIAL, 4.

COMMISSIONS. See BONDS, 1.

COMMITTEES. See COUNTIES, 1–3, 6.

COMPLAINT. See ACTION. APPEAL, 5. COUNTIES, 5, 6. GARNISHMENT, 4.
CONDITIONS PRECEDENT. See WILLS, 14.
CONNECTING CARRIERS. See CARRIERS, 1, 3.
CONSIDERATION. See WAIVER, 1.

CONSTITUTIONAL LAW.

Construction, operation, and enforcement of constitutional provisions. See MUNICIPAL CORPORATIONS, 5, 8.

A law ought not to be declared unconstitutional unless its repugnance to the constitution is clear and beyond reasonable doubt, and the court should point out the particular part of the constitution which is violated. *Lawrence University v. Outagamie County,* 244

Legislative powers. See MUNICIPAL CORPORATIONS, 2–5. TAXATION, 1–6.

Same: Delegation. See PEDDLERS, 1–4.

Same: Special legislation. See MUNICIPAL CORPORATIONS, 5.

Police power. See FOOD. PEDDLERS.

Classification. See TAXATION, 2, 4, 5.

Personal rights. See PEDDLERS. WILLS, 3, 4.

Uniformity of taxation. See TAXATION, 2.

CONSTRUCTIVE POSSESSION. See TAX TITLES, 3, 4.

CONSTRUCTIVE REDEMPTION. See TAX TITLES, 11–13.

CONTRACTS.

Requisites and validity. See CORPORATIONS, 2–4. FRAUDS, STATUTE OF. SALES.

Same: Conditional acceptance of offer.

1. Plaintiff, a company engaged in the fishing business, offered to pay H. $300 for the use of his tugboat for the season. H. replied, by way of a counter offer, "Go for three hundred for thirty days, you pay expenses one way." Plaintiff then wired: "Terms accepted, engage Capt. Garland, writing;" and also wrote to H., inclosing two copies of a lease and saying: "Please sign one copy and return it to us at once so that we may know the matter is settled. . . . We wired you this morning that your terms were accepted and to engage Capt. Garland. And we will write him also and engage his services. We want no other man if we can get him. . . ." H. promptly informed plaintiff that he would not consent to the engagement of Capt. Garland, but plaintiff did not recede in the matter of such engagement until about a week later, at which time H. had leased his boat to another person. *Held,* that plaintiff's acceptance of the counter offer was conditional upon the engagement of the captain named, and that as there had been no assent to such condition no contract was closed. *Jacob Johnson Fish Co. v. Hawley,* 578

Construction. See BAILMENT. BONDS. DEEDS. GARNISHMENT, 4. GUARANTY. INSURANCE, 1–6, 10–20. REWARDS, 2, 3.

2. Where a contract is filled in upon a printed form and the written provisions cannot be reconciled with the printed, the written provisions control. *Atlantic Terra Cotta Co. v. Goetzler,* 19

3. Under a contract, partly printed and partly typewritten, providing for the furnishing of building materials, it is *held* that the specified period within which the first shipment was to be made began to run from the date of the contract, and not from the time the detail drawings were approved and returned by the architect. *Ibid.*

4. A written contract to protect and indemnify another against loss, damage, or expense which he may sustain "or become liable for" in consequence of a certain act, is an agreement to protect against liability as well as damage, where the words quoted are not controlled by any other provisions of the contract. *Illinois Surety Co. v. Maguire,* 544

Performance or breach. See DAMAGES, 3. GARNISHMENT, 4.

5. Failure to pay for one car of lumber shipped in part performance of a contract of sale, where nothing was due under sixty days, by which time the seller had breached its contract and it was apparent that the buyer would suffer a considerable loss in consequence, would not bar recovery by the latter in an action for damages for such breach. *Garton Toy Co. v. Buswell Lumber & Mfg. Co.* 341

6. An order by a manufacturer of croquet balls and toys for "100 M ft. of 4 x 4 maple to be cut a little wane or heart on corners so that it will turn off. And 65 M ft. of 2½ inch plank cut so as to be No. 2 and better, with sound hearts," could not be filled by the vendor by shipment of No. 2 and better lumber, unless it was free from heart or wane except a little on the corners that could be turned off; and a requested instruction that he was entitled to determine and select the grades of lumber provided none was lower than No. 2 common, was properly refused. *Ibid.*

7. A requested instruction that under such order the vendor was entitled to deliver No. 2 common or No. 1 common according to the rules of the National Hardwood Association, "without, however, considering wane or heart on corners as a defect," was also incorrect. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See APPEAL, 13. MASTER AND SERVANT, 4. RAILROADS, 2, 3.

CORPORATIONS.

By-laws. See INSURANCE, 2, 3, 10–14.

1. As a general rule the by-laws of a corporation are made for its internal government and regulation, and third persons can assert no rights thereunder. *Zwolanek v. Baker Mfg. Co.* 517

2. But a by-law of a manufacturing corporation providing that any person who should have been in the regular employ of the company for a certain time should thereupon begin to share in the surplus earnings of the company, provided he did not quit or was not discharged prior to January 1st of any year, was, when communicated to the employees, an offer of a reward for constant and continuous service and, when accepted by an employee by substantial compliance with the terms of the offer before its withdrawal, became a complete and valid contract. *Ibid.*

3. It was not essential in such a case that the employee should have informed the company that he relied upon the offer in continuing his work. *Ibid.*

4. The statute of frauds relating to contracts not to be performed within one year has no application to such a case, because when the contract comes into existence the only obligation is that of the company to pay what is due under it. *Ibid.*

Officers: Authority: Judgment notes.

5. Without special authority, express or implied, the secretary and business manager of a corporation has no power to make a judgment note on its behalf. *Smith v. Dixon,* 110

Same: Enforcement of judgment against stockholders.

6. A judgment against a corporation, duly entered upon a judgment note executed by the secretary and manager thereof, is *prima facie* valid, and in an equitable action to collect the same from stockholders who received the entire property of the corporation upon its dissolution it is incumbent upon the defendants to show affirmatively, not only that the secretary had no authority to execute the note, but also that it would be unjust and inequitable to enforce the judgment. *Smith v. Dixon,* 110

7. To show that the judgment is inequitable in such a case it should be made to appear affirmatively that the corporation did not receive to its own use the money represented by the note. The evidence in this case is *held* not to show that fact. *Ibid.*

8. Evidence that during the two months after the note was given no single deposit of the amount of the note was made by the corporation at the bank at which it did business, and no larger deposit in which that amount might have been contained, is of little weight to show that the corporation did not receive the money, especially where the business of the corporation was transacted at a village ten miles from the bank and trips to the bank were made only once in several days. *Ibid.*

9. Delay by the holder of such note, at the request of the secretary of the corporation, for more than three years after it became due, before entering judgment thereon, during which time the secretary became insolvent, is *held* under the circumstances of this case not to have constituted laches precluding enforcement of the judgment. *Ibid.*

Dissolution. See CORPORATIONS, 6. STATE TREASURER, 3, 4.

10. Where a corporation proceeds voluntarily to dissolve, its existence within the meaning of sec. 1791*e* ceases when, but not until, certified copies of the resolution of dissolution have been duly filed and recorded as provided in sec. 1789, Stats. (Supp. 1906: Laws of 1905, ch. 507). *State ex rel. Sheldon v. Dahl,* 73

CORPUS of estate. See TRUSTS AND TRUSTEES, 5–17.

COSTS. See MUNICIPAL CORPORATIONS, 12.

COUNSEL FEES. See APPEAL, 18–21. EXECUTORS AND ADMINISTRATORS, 9–14.

COUNTERCLAIM. See GARNISHMENT, 2.

COUNTIES.

County board: Appointment of outsider on committee: Liability of appointee for acts resulting in loss.

1. A county board has no power to appoint as a member of a committee thereof a person not a member of the board. *Forest County v. Shaw,* 294
2. One not a member of the county board who is appointed to act on a committee thereof is a mere volunteer, having no official authority. *Ibid.*
3. One who undertakes without compensation to act with a committee and assist a county board in negotiating the sale of county bonds is not liable to the county for loss caused by an honest mistake in judgment. *Ibid.*
4. In law every intendment that harmonizes with honesty and fair dealing must be presumed in the light of the alleged facts. *Ibid.*
5. A mere averment in a pleading that acts and omissions were fraudulent adds nothing to the pleading, nor does it change the essential character of such acts and omissions. *Ibid.*
6. A complaint alleging that defendant, not a member of the county board, was appointed and served on its committee to negotiate the sale of county bonds to the best and highest bidder; that two bids for the bonds were received, the lower of which was accepted; that defendant controlled the action of the committee and, through fraud and corruption on his part and by collusion with the bidder, induced acceptance of such lower bid, thereby causing pecuniary loss to the county; but that the details and character of such corruption, fraud, and collusion are to the plaintiff unknown—does not state facts showing that defendant committed a fraud in the transaction, and hence states no cause of action. *Ibid.*

COUNTY BOARD. See COUNTIES.

COUNTY COURT. See APPEAL, 15–21.

COURTS.

Supreme court. See APPEAL AND ERROR.
Circuit courts. See APPEAL, 2, 15–23. OFFICERS, 2, 3.
County courts. See APPEAL, 15–21.
Civil court of Milwaukee county. See APPEAL, 22, 23.
Jurisdiction. See WILLS, 1, 6, 7.
Superintending control. See APPEAL, 10. OFFICERS, 3.

CRIMINAL LAW AND PRACTICE.

Nature and elements of crime. See HOMICIDE. RAPE.

Trial: Reception of evidence. See EVIDENCE, 1–3.

1. Upon a criminal trial, evidence that the accused, when charged with the offense, or when declarations touching his guilt were made in his presence and hearing, remained silent when it would have been proper for him to speak, is competent. *Hardy v. State,* 176
2. There was no error in such a case in charging the jury to the effect that testimony as to declarations made in the presence

of defendant is only to be considered on the question of identity and for no other purpose, and that statements made in his presence and not denied, disavowed, or explained by him when he had an opportunity to do so may be considered by the jury; nor in refusing to give a requested instruction that testimony "as to what was stated in the presence of the defendant and any officers accompanying him concerning the identity of the person who committed the crime charged . . . must be received and considered by you only concerning its effect upon the demeanor of the defendant at the time he was confronted with such identification." *Ibid.*

3. It was not prejudicial error, in such case, to permit counsel for the state to discuss to the jury a case previously tried in the same court, the jury being instructed that such discussion had no bearing on the question of the guilt or innocence of the defendant, but that it was not improper to use it by way of explanation and illustration, and that it could only be so considered by them. *Ibid.*

Same: Instructions to jury. See INSTRUCTIONS TO JURY, 3.

Appeal and error: Review. See CRIMINAL LAW, 2, 3. HOMICIDE, 1.

CROPPER. See ACCOUNT.

CROSS-EXAMINATION. See WITNESSES, 5–7.

CUSTOM AND USAGE. See SALES, 3, 4.

DAMAGES.

Measure of damages. See APPEAL, 7. CARRIERS, 10–12. WATERS AND WATERCOURSES, 4.

Excessive damages. See APPEAL, 13.

1. Where plaintiff's injuries consisted of a scalp wound, involving a surgical operation and loss of one eye with some impairment of vision in the remaining eye, headache, and dizziness, and the ordinary loss of capacity, disfigurement, etc., resulting from the loss of an eye, an award of $6,000 is *held*, though large, not so excessive as to call for reversal or modification on appeal. *Brossard v. Morgan Co.* 1

2. Where, as in actions for personal injuries, the damages are unliquidated and cannot be determined by rule, the jury and trial judge are responsible for a proper assessment thereof and cannot shift that responsibility. In ordinary cases the supreme court will not interfere with the assessment, but in a case of gross and manifest abuse, where the amount awarded by the jury indicates passion or prejudice and the trial judge has failed to act properly, will exercise its revisory power and reduce the award by granting a new trial conditionally, as the trial judge should have done. *Ibid.*

Evidence.

3. Upon the question of damages for the vendor's breach of a contract to furnish lumber of certain dimensions, the vendee should not be concluded by a statement in its bill of particulars that there was a waste of "at least 12,642 feet" in resawing planks purchased to fill out the contract, especially where it appeared that such figures were the result of a mere estimate. *Garton Toy Co. v. Buswell L. & Mfg. Co.* 341

DAMS. See WATERS AND WATERCOURSES.

DECLARATIONS. See CRIMINAL LAW, 2. EVIDENCE, 1–3. INSTRUCTIONS TO JURY, 3.

DEDICATION.

1. In order to make a valid statutory dedication of land to public use, the statute must be substantially complied with. *University of Our Lady of the Sacred Heart v. Watertown,* 505
2. Ch. 210, Laws of 1865, relating to the platting of lands in the city of Watertown, and prohibiting the recording of any plat until approved by the common council and a certified copy of the resolution of approval affixed in the manner therein provided, is mandatory; and a plat recorded without compliance therewith does not pass title to streets indicated thereon or show a statutory dedication to the public. *Ibid.*
3. Compliance with said statute cannot be presumed where the record shows that the copy of the resolution of approval was not affixed to the plat. *Ibid.*

DEEDS.

Requisites and validity. See TAX TITLES, 1–3.

Construction.

It was adjudged that the survivor of two partners held the title to an undivided half interest in certain land in trust for the firm and that he should convey an undivided half of the firm's interest (*i. e.* a one-fourth interest in the lands) to the administrator of the deceased partner in trust for the heirs at law and creditors of said decedent; also that the survivor pay to such administrator the sum of $3,450.04 and that the same be a lien on the interest of said survivor in said lands. The survivor thereafter conveyed to the heirs of said deceased partner the undivided half of the lands, reciting, among other things, that the deed was given in satisfaction of the judgment and that it was a conveyance of the title held by the grantor. *Held,* that such conveyance was of an undivided half (not merely a fourth) interest in the lands, it being deemed that the grantor conveyed his own interest in satisfaction or part satisfaction of the money which he was adjudged to pay. *Field v. Pier,* 83

DELAY. See CORPORATIONS, 9. SCHOOLS AND SCHOOL DISTRICTS, 4.

DELEGATION OF LEGISLATIVE POWERS. See PEDDLERS, 1–4.

DELIVERY. See CARRIERS, 1–9. FRAUDS, STATUTE OF, 2, 3. SALES, 3, 4.

DEMAND. See TAX TITLES, 8.

DEMURRAGE. See CARRIERS, 4–9.

DEMURRER. See APPEAL, 5. COUNTIES, 6.

DIRECTION OF VERDICT. See MASTER AND SERVANT, 6.

DISCHARGE. See GUARANTY, 2.

DISCRETION. See EXECUTORS AND ADMINISTRATORS, 13. NEW TRIAL, 1. STATE TREASURER, 3, 4.

DISSOLUTION. See CORPORATIONS, 6, 10. SCHOOLS AND SCHOOL DISTRICTS, 5–9. STATE TREASURER, 3, 4.

DITCHES: Construction across highway. See TOWNS, 2, 3.

DIVIDENDS. See TRUSTS AND TRUSTEES, 6–17.

DOCUMENTARY EVIDENCE. See EVIDENCE, 4. FRAUDS, STATUTE OF.

DRAINS.

Drainage districts: Assessments against other districts.

1. Under the statute relating to drainage districts, and particularly sec. 1379—18, Stats. (Supp. 1906: Laws of 1905, ch. 419), one district has the right to make an assessment against another district to the extent of the benefits the latter will receive from the construction of the former's work. *Rattlesnake D. Dist. v. Koshkonong Mud Creek D. Dist.* 223
2. It is not a valid objection to such an assessment that only a part of the land in the district assessed will be benefited by the other's work. It is for the commissioners of the district assessed to apportion the assessment against the lands therein according to law, and in reviewing such assessment it must be presumed they will perform this duty properly. *Ibid.*
3. Under the statute the commissioners of a drainage district are public officers and a presumption is created in favor of the regularity and validity of their official acts, which must be overcome by the person who calls the same in question. *Ibid.*
4. Proof that lands in one district were not properly or sufficiently drained and that its ditches had not sufficient outlet; that the ditches in a district subsequently organized were lower and relieved the ditches of the first district by furnishing an outlet, thereby keeping the ditches of the first district in such condition and repair as to furnish ample drainage for the whole district, is sufficient to support an assessment against such first district. *Ibid.*
5. It is not essential to the validity of an assessment against a drainage district that the owners of land therein should be made parties to the proceeding. The district is a body corporate and has sole identity independent of such landowners, and the assessment is against it as a legal entity, not against them. *Ibid.*

Ditches: Construction under or across highway. See TOWNS, 2, 3.

DURESS. See CARRIERS, 7, 8.

DYING DECLARATIONS. See EVIDENCE, 1–3. INSTRUCTIONS TO JURY, 3.

EJECTMENT. See ADVERSE POSSESSION.

ELECTIONS. See VILLAGES, 2.

EQUITY: Laches. See CORPORATIONS, 9. SCHOOLS AND SCHOOL DISTRICTS, 4.

ESTATES: When vest. See WILLS, 13, 14.

ESTOPPEL. See EXECUTORS AND ADMINISTRATORS, 7. INSURANCE, 12. WAIVER, 2.

EVIDENCE.

Presumptions. See CARRIERS, 8. COUNTIES, 4. DEDICATION, 3. DRAINS, 2, 3. TRUSTS AND TRUSTEES, 11.

Burden of proof. See GARNISHMENT, 3. INSTRUCTIONS TO JURY, 2. INSURANCE, 9. SALES, 1. TRUSTS AND TRUSTEES, 11.

Relevancy and competency. See CRIMINAL LAW. EVIDENCE, 2, 3. LIBEL AND SLANDER, 3. PRINCIPAL AND AGENT, 1. TRIAL, 3, 4.

Declarations. See CRIMINAL LAW, 2.

Same: Dying declarations. See INSTRUCTIONS TO JURY, 3.

1. No reasonable request for a statement of the circumstances under which a mortal injury was inflicted, and no reasonable or proper insistence upon such statement where such insistence is essential to diagnosis by a physician or as a protection against prosecution, will be sufficient to exclude a dying declaration. *State v. Law,* 313

2. Thus, a dying declaration in which a woman charged defendant, a physician, with having attempted an abortion was not rendered incompetent by the fact that another physician, called to treat her when she was in a dangerous condition, had refused to do so until he procured from her a full history of the case, either to enable him to treat her or for his own protection. *Ibid.*

3. Where a woman upon whom defendant is alleged to have attempted an abortion stated in a dying declaration that her sickness followed the removal of a tube alleged to have been inserted by defendant in her uterus, but did not say that such sickness, to the point of disability, followed immediately upon such removal, and it appeared that the severe or acute sickness did not set in until three days later, evidence that her husband had sexual intercourse with her during that interval was irrelevant and inadmissible to contradict her dying declaration. *Ibid.*

Documentary evidence. See FRAUDS, STATUTE OF.

Same: Self-serving memoranda.

4. A memorandum relating to a sale, made by the vendee in his own interest but not brought to the knowledge of the vendor at the time, is not substantive evidence of the facts, as against the vendor. *Haueter v. Marty,* 490

Parol or extrinsic evidence affecting writings. See ACCORD AND SATISFACTION. CONTRACTS, 2. GUARANTY, 1.

Opinion evidence: Subjects of expert testimony.

5. To show the difference between a straight grade of No. 2 common and better and No. 2 common and better from which was excluded all pieces of lumber which had either wane or heart that would not turn off in the process of manufacturing croquet balls, and to justify the purchase by the vendee of a large proportion of lumber of higher grade than No. 2 common, a witness on behalf of the vendee was properly allowed to testify that the 4 x 4's ordered would make a grade of No. 1 common and better lumber, and as to the proportion of higher grades which would be included in the "No. 2 common and better" called for by the contract. *Garton Toy Co. v. Buswell Lumber & Mfg. Co.* 341

6. The vendor having failed to deliver a large part of the lumber ordered, and the vendee having been unable to find maple 4 x 4's in the market and having been obliged to purchase four-inch planks of greater width and resaw them with considerable waste, the question as to what quantity of such planks of the kinds and grades purchased would be required to make as many croquet balls as could be made from the 4 x 4's contracted for and not delivered, was a proper subject for expert testimony. *Ibid.*

Same: Competency of experts.

7. Sec. 1436, Stats. (Laws of 1903, ch. 426, sec. 8), does not preclude experts in bacteriology, biology, embryology, etc., from testifying as such, where they are not persons practicing medicine, surgery, or osteopathy and do not testify in a professional capacity as physicians, surgeons, or insanity experts. *State v. Law,* 313

Weight and sufficiency. See ACCOUNT. ADVERSE POSSESSION. CARRIERS, 1, 2. CORPORATIONS, 7–9. DRAINS, 4. EVIDENCE, 1–4. HOMICIDE, 2. INSURANCE, 8, 20. MASTER AND SERVANT, 1, 2. NEGLIGENCE, 4. RAILROADS, 2, 3. RAPE. TOWNS, 3.

EXCEPTIONS. See APPEAL, 3.

EXCESSIVE DAMAGES. See APPEAL, 13. DAMAGES, 1, 2.

EXECUTORS AND ADMINISTRATORS.

Qualification: Bond.

1. Where, after requiring an executrix appointed by the will without bond to give a bond, the county court made an order staying all proceedings for thirty days, it had power to accept and approve a bond given by the executrix after the expiration of the stay. *Schnorenberg v. Schnorenberg,* 537

2. Nothing in secs. 3794, 3795, or 3796, Stats. (1898), precludes such extension of the time for giving bond. The provision in sec. 3796 that "no person named executor in any will, who neglects to qualify for twenty days after probate thereof, shall intermeddle or act as such," merely forbids the executor before qualification to take upon himself the duties of executor or to interfere with the property of the estate. *Ibid.*

Actions: When executors are necessary parties. See PARTIES, 1, 2.

Accounting. See APPEAL, 15–21. TRUSTS AND TRUSTEES, 5–17.

Same: Personal liability: Payments on order of court: Good faith.

3. A county court order entered on due presentation with opportunity for parties to be heard, and ordinary advisory orders as regards business management of an estate, acted upon in good faith by an executor or administrator, protect such executor or administrator from personal liability. *Will of Rice: Cowie v. Strohmeyer,* 401

4. A contract between attorneys and representatives of persons not *sui juris* and others,—beneficiaries of a trust fund held by an executor,—requiring such attorneys to guard the fund against undue depletion, yet stipulating for such attorneys, compensation equal to the amount the court shall allow adversary attorneys, making it for the pecuniary interest of the former to have such amount placed high and their duty to have it placed as low as practicable, is contrary to public policy, not binding on the beneficiaries, especially those who are *sui juris,* and does not create any legitimate basis for the court to act upon. *Ibid.*

5. If an executor acts, reasonably, and in good faith in the disbursement of money pursuant to an order of the supervising court within its jurisdiction to make, he is protected thereby from personal liability. *Ibid.*

6. An executor who pays out trust funds pursuant to the court's direction outside the scope of any subject matter of such court's jurisdiction is personally responsible therefor. *Ibid.*

7. Beneficiaries of a trust fund who by mistake as to their own rights or authority over such fund consent to improper disbursements therefrom to attorneys and guardian *ad litem* for past services, are not estopped from insisting upon a restoration of the fund; especially is that so as to beneficiaries who are not *sui juris* and represented by guardians having no right to stipulate away their rights. *Ibid.*

8. If an executor, in good faith, disburses money of a trust fund pursuant to an order, bad for error, such order if seasonably and properly challenged, may be set aside or corrected so as to permit following the fund and recovering from the parties who received the money, but not so as to charge the executor personally. *Ibid.*

Same: Expenses of administration: Attorneys' fees.

9. Legitimate counsel fees for the executor in an administration matter are, in general, limited to fair compensation for services reasonably required to be done and actually performed, commonly done by one attorney, or firm of attorneys. *Will of Rice: Cowie v. Strohmeyer,* 401

10. Attorneys for beneficiaries under a will who intervene and assist in the administration of an estate are not entitled to be paid for their services out of the trust fund, and representatives of beneficiaries who are not *sui juris* have no authority to stipulate to the contrary. *Ibid.*

11. The court having jurisdiction of supervising a trust may provide for payment out of the trust fund for reasonable expenses in protecting the trust. *Ibid.*

12. Reasonable attorneys' fees for services actually and rightfully rendered, doing that which is reasonably necessary in conserving a trust estate, are allowable to the trustee as expenses, and may be allowed direct to the attorney, chargeable to the trust fund; and such services may be so compensated when, from the necessities of the case, they are rendered at the request of the *cestuis que trustent* acting in place of the trustee. *Ibid.*

13. The amount of the compensation to be allowed in such cases is always within the discretion of the court, not controlled by contract, and should be determined with reference to the reasonable necessity for the services, the amount and nature thereof and the extent of the resulting benefits, and should be fixed upon the basis of compensation for somewhat similar services in official life, rather than the customary charges as between attorney and client. *Ibid.*

14. Ordinarily the supreme court will not go further than to fix the compensation for services rendered on appeal, leaving the court below to deal with the matter of services rendered there; but in extraordinary cases the higher court may cover the entire field, terminating the litigation in all respects. *Ibid.*

EXEMPTIONS. See TAXATION.

EXPERT TESTIMONY. See EVIDENCE, 5–7.

FALSE REPRESENTATIONS. See FRAUD.

FELLOW-SERVANTS. See MASTER AND SERVANT, 5.
FIDELITY INSURANCE. See INSURANCE, 15–20.
FINDINGS. See APPEAL, 11. TRIAL, 6.
FIRE INSURANCE. See INSURANCE, 1–9.
FLOWAGE. See WATERS AND WATERCOURSES.

FOOD.

See LIBEL AND SLANDER, 1.

[Whether sec. 1670*m*, Stats. (Laws of 1911, ch. 381), relating to the manner of weighing and paying for cheese purchased at wholesale, is valid, not determined.] *Haueter v. Marty,* 490
FORECLOSURE. See ACTION. MORTGAGES.

FRAUD.

See COUNTIES, 5, 6.

1. In an action by the vendee to recover the purchase price paid for a horse, upon the ground of fraud in concealing the fact that the horse was afflicted with a disease which rendered it worthless and in falsely representing that it had another disease and that such disease was of no consequence, it appeared that the horse, when sold, obviously had some disease, but upon the evidence it was a question for the jury whether this materially lessened its value. It was also a question for the jury whether plaintiff relied upon the alleged representation or was induced to purchase by the concealment, but the trial court refused to submit that question; and the jury, disagreeing, left unanswered the question whether defendant, for the purpose of inducing the sale, falsely and deceitfully failed to inform plaintiff that the horse was afflicted with disease. *Held* that, the material issues mentioned not having been determined by the special verdict, a judgment for plaintiff was not warranted. *Schauer v. Bodenheimer,* 550
2. It was prejudicial error in such case to refuse to submit to the jury the question whether plaintiff relied upon the alleged false and fraudulent statement. *Ibid.*

FRAUDS, STATUTE OF.

See CORPORATIONS, 4.

1. A typewritten signature of the name of the vendee corporation to an order for merchandise is sufficient under the statute of frauds to bind such corporation. *Garton Toy Co. v. Buswell Lumber & Mfg. Co.* 341
2. Although such an order was not signed or accepted in writing by the vendor, a delivery of part of the goods ordered, pursuant thereto, was sufficient part performance to take the case out of the statute. *Ibid.*
3. A letter written in reply to a request for deliveries of lumber on plaintiff's previous order, stating that defendant had advised its mill to ship one car at once, then stating that the contract was indefinite as to date of completion, and suggest-

ing a mutual understanding allowing defendant four or five months' time in which to fill the order, is construed as showing such shipment to have been in unqualified compliance with the contract, thereby tolling the statute. *Ibid.*

FRAUDULENT REPRESENTATIONS. See FRAUD.

FREIGHT. See CARRIERS.

GARNISHMENT.

1. Where garnishees severally answer, admitting indebtedness to the principal defendant but alleging that a third person claims to be the owner of the demands, plaintiff need not traverse such answers if satisfied with the amounts admitted. *Kindinger v. Behnke,* 557

2. Nor where the third person intervenes and by an answer claims to own the demands against the garnishees is a traverse of such answer necessary, since the affirmative matter therein not constituting a counterclaim is in issue by force of sec. 2667, Stats. (1898). *Ibid.*

3. In any event, when an intervener comes in either as plaintiff or defendant for the purpose of making a claim to some property or fund adverse to the other parties or either of them, the burden of proof is upon him to establish such claim. *Ibid.*

4. The complaint in this case, claiming damages on account of destruction, alteration, and injuries to sawmill property leased by plaintiff to defendants, is *held* to be based upon alleged breach of the covenants of the lease and to state a cause of action on contract, not one sounding in tort. *Ibid.*

5. Sec. 2753, Stats. (1898), providing for garnishment "in any action to recover damages founded upon contract," is not limited to actions for liquidated damages. *Ibid.*

GROSS NEGLIGENCE. See CARRIERS, 13. NEGLIGENCE, 1.

GUARANTY.

See INSURANCE, 15–20.

1. Evidence of conversations prior to the signing of a written contract, with reference to the meaning thereof, is not admissible to show an understanding between the parties contrary to the unambiguous terms of the contract. *Sentinel Co. v. Smith,* 231

2. Where a guaranty is of payment, not of collection, failure to give notice of a default or to demand payment promptly does not discharge the guarantor, in the absence of any connivance or gross negligence amounting to a fraud upon him. *Ibid.*

GUARDIAN AD LITEM.

See APPEAL, 21. EXECUTORS AND ADMINISTRATORS, 7.

The duties of guardians *ad litem* in the settlement of an estate are, in general, merely advisory and supervisory; they have no authority to stipulate away any part of the trust fund, or to intervene and do the work of the executors or their attorneys at the expense of the estate. *Will of Rice: Cowie v. Strohmeyer,* 401

HIGHWAYS: Location: Right to construct ditch under or across. See TOWNS, 2, 3.

HOLDER IN DUE COURSE. See BILLS AND NOTES, 2.

HOMICIDE.

See EVIDENCE, 1–3. INSTRUCTIONS TO JURY, 3.

1. Where, upon his own testimony, accepting it as true, the accused should have been convicted, as he was, of murder in the second degree, he was not prejudiced by an incorrect definition, in the charge, of manslaughter in the fourth degree. *Carlone v. State*, 38

2. To bring a homicide within the third degree of manslaughter as defined in sec. 4354, Stats. (1898), it is not sufficient proof of "heat of passion" for the accused merely to testify that he was exceedingly angry or passionate at the moment in question, but such testimony must be supplemented by proof of facts and circumstances showing such provocation as would ordinarily produce heat of passion. *Ibid.*

3. Where a middle-aged man, a member of a gang of section workers on a railroad, had locked out of a box car in which they slept a boy about sixteen years old who was in the habit of returning to the car after the others had retired and disturbing their rest, and in the quarrel which followed the boy, although he was in no personal danger and there was nothing to indicate that the man intended any harm to him or to put any great affront upon him, procured a rifle and either shot at the man or, as he testified, attempted to "shoot past him" and scare him, and in so doing killed another person in the car, he was guilty at least of murder in the second degree. *Ibid.*

HUSBAND AND WIFE. See WITNESSES, 1, 2.

IDENTITY. See CRIMINAL LAW, 2.

IMPEACHMENT. See WITNESSES, 5–7.

IMPLIED TRUSTS. See TRUSTS AND TRUSTEES, 1–4.

INCOME. See TRUSTS AND TRUSTEES, 15–17. WILLS, 13, 14.

INCOMPETENCY. See MASTER AND SERVANT, 1. NEGLIGENCE, 6.

INDEMNITY. See CONTRACTS, 4. INSURANCE.

INFANTS. See TAX TITLES, 10. WAIVER, 2.

INSTRUCTIONS TO JURY.

Requests for instructions. See CONTRACTS, 6, 7. CRIMINAL LAW, 2. RAILROADS, 11.

1. A requested instruction to the jury which is confused and unintelligible may properly be refused. *Collins v. Chicago & N. W. R. Co.* 305

Burden of proof. See INSURANCE, 9.

2. An instruction to the effect that as to certain questions in a special verdict the burden of proof was on the affirmative, *i. e.* that the jury should not answer them in the affirmative unless satisfied by a preponderance of the evidence that they should be so answered, and that as to another question the burden was on the negative and the jury should not answer it in the nega-

tive unless satisfied by a preponderance of the evidence that it should be so answered, was not confusing or misleading. *Haueter v. Marty,* 490

Custom and usage. See SALES, 3, 4.

Declarations. See CRIMINAL LAW, 2. INSTRUCTIONS TO JURY, 3.

Dying declarations.

3. Instructions given to the jury with reference to a dying declaration and the weight and credit to be given it, by which the jury were allowed to pass upon the mental capacity of the declarant and the question whether her declaration was made freely and voluntarily, are approved. *State v. Law,* 313

Guilt or innocence. See CRIMINAL LAW, 3.

Identity. See CRIMINAL LAW, 2.

Manslaughter. See HOMICIDE, 1.

Ordinary care. See RAILROADS, 11.

INSURANCE.

FIRE.

Mutual companies: Assessments: Default in payment: Waiver.

1. An unliquidated and disputed claim by a policy-holder against an insurance company does not justify refusal to pay an assessment, nor relieve him from the penalty of default. *Stutzman v. Cicero Mutual Fire Ins. Co.* 254
2. A provision in the by-laws of a mutual fire insurance company that no person shall receive any benefit or advantage from the company under or by virtue of a policy until all assessments are fully paid, is a valid condition, is self-executing, and requires no affirmative action on the part of the company to make it effective. *Ibid.*
3. The words "any benefit" in such by-law include protection against loss or damage by fire. *Ibid.*
4. Where a loss occurs during the suspension of the policy by reason of nonpayment of an assessment, subsequent payment or tender thereof cannot relate back so as to remove the suspension and default. *Ibid.*
5. A demand by the insurer for the payment of an assessment in default is not a waiver of the suspension of the policy. *Ibid.*

Same: Proofs of loss: Waiver.

6. Service of proofs of loss by the insured without any request by the insurer, and the retention thereof by the latter, do not constitute a waiver of such suspension. *Stutzman v. Cicero Mutual Fire Ins. Co.* 254

Proof of title to realty.

7. In an action to recover for a loss under a policy insuring a dwelling house, proof of possession of the property at and prior to the time when the policy was issued was sufficient *prima facie* evidence of plaintiff's title to the real estate, especially where the policy described the house as his and was issued upon a written application stating that the building was upon land owned by him. *Kobin v. St. Paul F. & M. Ins. Co.* 591

False swearing by insured.

8. Although plaintiff contradicted himself several times and gave some evidence strongly indicating that he wilfully swore falsely, yet upon the whole record, it appearing among other things that he did not understand the English language well and that he was considerably confused in answering questions on cross-examination, it is *held* that findings by the jury to the effect that neither in his proofs of loss nor in his examination before a justice under the policy had he knowingly and intentionally sworn falsely as to matters relating to the insurance, should not be disturbed. *Kobin v. St. Paul F. & M. Ins. Co.* 591

9. An instruction to the jury in such case that the burden of proof both as to falsity of statement and as to wilfully false swearing was upon the defendant, was correct. The burden of proof did not shift. *Ibid.*

LIFE.

Mutual benefit societies: Constitution and by-laws: Amendment: Power to change contract: Payment of assessments after amendment.

10. Although the certificate issued by a mutual benefit society to a member provides that he shall comply with all the laws, rules, and regulations of the society, and power to repeal or amend the constitution and by-laws is reserved therein and in the charter, this does not authorize the society by any such amendment or repeal to nullify or materially alter the contract of insurance expressed in the certificate. *Stirn v. Supreme Lodge,* 13

11. Thus, where the contract was that the society should pay the wife of the member $1,000 upon his death, but if she died first should pay him $250 upon her death and the balance after his decease to a beneficiary named by him, no amendment to the constitution and by-laws could cut off his right to receive the $250 at the death of his wife, and make the whole sum of $1,000 payable only upon his death. *Ibid.*

12. Where the member continues to pay assessments after notice of an amendment to the by-laws purporting to alter his contract, but refuses to surrender his certificate and accept a new one containing such alteration, the payments do not show a consent to the change. *Ibid.*

Same: Right to dispose of proceeds by will.

13. Provisions in the by-laws of a mutual benefit society, which became part of the insurance contract with a certificate holder, as to who might be named as beneficiaries either originally or when a change was made, and that "no payments shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, heir, blood relative, or person dependent upon or member of the family of the member at the time of his death," and that in case no beneficiary is named or if those named predecease the certificate holder the amount due on the certificate shall be payable to the immediate relatives and heirs in a certain order therein named, and in default of any such relatives and heirs surviving "then to the next of kin who would be the distributees of the personal es-

tate of the member upon his death intestate,"—did not deprive the certificate holder of the right, which attaches to his insurance contract under the laws of this state, to dispose by will of the proceeds of his certificate. *Armstrong v. Blanchard*, 31

14. So *held*, in a case where the beneficiary named had predeceased the certificate holder and no new beneficiary had been designated in accordance with the by-laws, and the certificate holder bequeathed the proceeds of the certificate to nieces and a cousin, who were not his heirs at law nor his immediate relatives in the order named in the by-laws, there being surviving brothers and a sister. *Ibid.*

FIDELITY.

Indemnity bond: Construction: Application.

15. An indemnity bond issued by a surety company insuring a bank against loss through dishonesty of employees, providing that the employer might at any time transfer an employee from one position to another without notice to the company, was not affected by the promotion, without notice to the company, of the assistant cashier to be cashier, especially where such change was one in name only and did not alter the character of the work done by such employee. *First Nat. Bank v. United States F. & G. Co.* 601

16. An indemnity bond by which a surety company agrees to pay to the employer the amount of any loss he shall sustain "through the dishonesty . . . or through any act of omission or commission of any of the employees, done or omitted in bad faith," and which provides for prompt notice of any loss, for the furnishing of proof thereof within six months, and that no action shall be maintained on the bond unless commenced within one year from the time of making claim for the loss, is essentially an insurance contract guarantying payment, and is not a mere guaranty of collection upon which the employer can recover only after exhausting his remedies against those primarily liable. *Ibid.*

17. A provision in such a bond that the employer shall notify the surety company of certain facts—such as that an employee is dishonest or has acted in bad faith—if the same shall "come to the knowledge of the employer," is construed to mean *actual* knowledge, and not mere constructive notice. It did not, in this case, require a bank to notify the company of facts of which it had no actual knowledge, but of which it might have known had its officers made a critical examination of its books from time to time. *Ibid.*

18. Where an indemnity bond insuring a bank against loss through dishonesty of its employees did not require examinations of the books of the bank to be made, representations in the application for the bond that the bank would be examined periodically by its officers and directors should, in order to be available as a defense to an action on the bond, be pleaded. *Ibid.*

19. Mere negligence in respect to such examinations on the part of the officers or directors of the bank, resulting in a loss, is not a defense to an action on the bond unless the negligence was such as to amount to fraud or bad faith. *Ibid.*

20. A finding of fact by the trial court, to the effect that transactions prior to the issuance of the bond, in which a "kiting" of

checks had been permitted by an employee of the bank, were the result of ignorance and an error in judgment and not of any bad faith on the part of such employee, is *held* to be sustained by the evidence. *Ibid.*

INTERPLEADER. See MORTGAGES, 1.

INTERVENTION. See GARNISHMENT, 2, 3.

JOINDER OF CAUSES OF ACTION. See ACTION.

JOINT SCHOOL DISTRICTS. See SCHOOLS AND SCHOOL DISTRICTS, 1–4.

JUDGMENT.

By confession. See CORPORATIONS, 6–9.

On trial of issues. See FRAUD, 1. MORTGAGES, 2.

On foreclosure. See MORTGAGES, 1.

Collateral attack: Conclusiveness. See APPEAL, 12–14.

1. Notwithstanding fatal jurisdictional error within the scope of judicial power as to a particular subject matter, the determination involved is conclusive between the parties and their privies respecting collateral attack. *Will of Rice: Cowie v. Strohmeyer,* 401
2. In case of error by acting beyond judicial power, the result is a usurpation and not binding on any one. *Ibid.*
3. Whether a judgment is jurisdictionally bad for judicial error instead of for excess of power, turns on whether the court had jurisdiction of such subjects as the one deliberated upon. *Ibid.*
4. Jurisdiction of the subject matter has reference not only to nature of cause of action and relief sought, but judicial power of the court, referable to its organic act and other enabling written laws. *Ibid.*
5. A cause of action or matter legitimately deliberated upon, may, within the scope of the court's subjects of jurisdiction, be as broad as parties make it by pleadings, argument, or evidence admitted without objection, but if the court goes beyond that its determination is *coram non judice.* *Ibid.*

JUDGMENT NOTES. See CORPORATIONS, 5–9.

JURISDICTION. See APPEAL, 1, 2. JUDGMENT, 1, 3, 4. WILLS, 1, 16, 17.

JURY.

Conduct. See NEW TRIAL, 1.

1. The conduct of jurors, while considering their verdict in an action by a brakeman for personal injuries, in requesting the attending officer to procure for them the measurements of certain cars and an engine tender in defendant's yards, and of the officer in complying with such request, was not only improper but highly censurable, regardless of its effect upon the verdict. *Ketchum v. Chicago, St. P., M. & O. R. Co.* 211
2. But, where the information so obtained had no apparent bearing upon the question of defendant's negligence, and the trial court, upon a motion for a new trial based on affidavits showing the facts, decided that it had no effect upon the verdict, such misconduct does not justify reversal of a judgment in

favor of the defendant, especially since the enactment of ch. 192, Laws of 1909 (sec. 3072*m*, Stats.), which requires an affirmative showing of error affecting the substantial rights of the appellant. *Havenor v. State*, 125 Wis. 444, distinguished. *Ibid.*

LACHES. See CORPORATIONS, 9. SCHOOLS AND SCHOOL DISTRICTS, 4.

LANDLORD AND TENANT. See ACCOUNT.

LEGACIES. See WILLS, 12.

LEGISLATIVE POWERS. See MUNICIPAL CORPORATIONS, 2–5. PEDDLERS, 1–4. TAXATION, 1–6.

LIBEL AND SLANDER.

1. In an action for slander where the complaint alleged that defendant had said of plaintiff, a manufacturer of cheese, that he was a swindler and a cheat and that he had swindled and cheated one of his patrons by wrongfully accusing such patron of having sold adulterated milk, for the corrupt purpose of extorting money from said patron, the defendant, pleading in defense the truth of the words spoken, was properly allowed to allege and prove other instances in which plaintiff had extorted money from his patrons in a like corrupt manner, tending to show that he was in the habit of cheating and swindling them. *Bilgrien v. Ulrich*, 532
2. In such action the admission of testimony as to the state of health of the patron named in the alleged slanderous words at the time plaintiff is alleged to have extorted money from him, was not prejudicial error. *Ibid.*
3. Acquittal in a criminal prosecution is not competent evidence against the defendant in a civil action, brought by the person so acquitted, for a slander alleged to have been uttered concerning the transactions involved in the criminal case. *Ibid.*

LIFE INSURANCE. See INSURANCE, 10–14.

LIFE TENANT. See TRUSTS AND TRUSTEES, 5–17.

LIMITATION OF ACTIONS. See TAX TITLES, 8.

MACHINERY. See MASTER AND SERVANT, 2–7. NEGLIGENCE, 4, 5.

MANDAMUS. See MUNICIPAL CORPORATIONS, 8.

MASTER AND SERVANT.

The relation. See PRINCIPAL AND AGENT, 1.

Services and compensation. See CORPORATIONS, 2–4.

Master's liability for injuries to servant in general. See RAILROADS, 4–11.

Same: Incompetent fellow-servant. See NEGLIGENCE, 6.

1. Evidence showing, among other things, that an employee engaged in loading logs on a flat car was young and inexperienced and did not place the logs which were to ride above the stakes of the car and the cross-chains attached thereto, in proper shape so that they would lie securely and properly tie the load, this being work which required the exercise of some skill, judgment, and care, is *held* sufficient to sustain a finding by the jury that he was incompetent. *Freeman v. Dells Paper & Pulp Co.* 93

Same: Machinery and appliances. See NEGLIGENCE, 4, 5. TRIAL, 3.

2. Proof that a drive-belt, used to operate a wood-working machine near which plaintiff worked in defendant's factory, was made of several pieces spliced together and fastened with glue, that it was old and had parted several times, and that after separating at one of the splices and being repaired it separated again at the same place about two hours after starting up, is *held* sufficient to sustain a finding of negligence in furnishing defective appliances. *Brossard v. Morgan Co.* 1

3. *It seems* that every sane man is bound to anticipate that the breaking of a defective belt driven at a high rate of speed and subject to great strain may result in injury to a person at work near such belt; but in any event the proof in this case that the superintendent of defendant's factory knew of the probability of such injury was sufficient to charge the defendant with such knowledge. *Ibid.*

4. Although the jury found that there was no negligence in failing to guard the belt which broke, so that the defense of assumption of risk was open to defendant, there was no error in failing to submit a separate question on that subject, none being asked by defendant; and on appeal that question will be deemed to have been included in and covered by the question relating to contributory negligence. *Ibid.*

5. The fact that a drive-belt which broke and injured plaintiff had shortly before been repaired by another employee of the defendant, who was regularly charged with the duty of making repairs, and put back in its place in a defective condition, would not relieve defendant from liability, either under the fellow-servant rule or on the ground that the act of repairing the belt was an ordinary step in the progress of the work in which plaintiff with others was engaged. *Ibid.*

Same: Unguarded machinery.

6. Plaintiff was injured by a small piece of wood thrown forward by an uncovered circular rip-saw which he was operating in defendant's factory. Upon evidence showing, among other things, that he was experienced in and familiar with the dangers of such work and must have known that pieces of wood were constantly accumulating on the saw table and, by a slight vibration of the table, were being caused to move towards the back of the saw where its teeth came up through the table, it is *held* that defendant's negligence, if any, consisted in using the uncovered saw; that plaintiff had assumed the risk of injury therefrom; and hence that a verdict for defendant should have been directed. *Allen v. Green Bay Mfg. Co.* 545

7. The vibration of the saw table in such case, being obvious to ordinary attention, was not a latent danger against which defendant was bound to warn the plaintiff. *Ibid.*

Same: Inspection. See RAILROADS, 6, 7.

Warning servant. See MASTER AND SERVANT, 7. NEGLIGENCE, 5. RAILROADS, 8. TRIAL, 3.

Fellow-servants. See MASTER AND SERVANT, 5.

Assumption of risk. See MASTER AND SERVANT, 4, 6.

Contributory negligence. See MASTER AND SERVANT, 4.

Liabilities for injuries to third persons. See BAILMENT, 4–6.

MAXIMS.
Hoc volo, sic jubeo, sit pro ratione voluntas, 160.
Judicia sunt tanquam juris dicta et pro veritate accipiuntur, 439.
Res judicata pro veritate accipitur, 437, 439, 440.
Respondeat superior, 43, 56, 57, 59, 60.

MEASURE OF DAMAGES. See APPEAL, 7. CARRIERS, 10–12. WATERS AND WATERCOURSES, 4.

MEETINGS of town board. See TOWNS.

MEMORANDA. See EVIDENCE, 4.

MINORS. See TAX TITLES, 10. WAIVER, 2.

MORTGAGES.

Foreclosure. See ACTION.

1. Where, in an action to foreclose a mortgage, defendant paid the amount due into court, and a bank which had possession of and claimed to own the notes and mortgage was interpleaded as a defendant, and the mortgage was discharged by agreement, the action ceased to be a foreclosure action under the statute and became one of interpleader, involving only the question of ownership of the securities. The statute (sec. 3162, Stats. 1898) prescribing the form of judgment in foreclosure actions was therefore inapplicable. *Swanby v. Northern State Bank,* 572

2. It appearing in such case from the pleadings that instalments of the mortgage debt had been paid by the mortgagors to the bank, and it being found that plaintiff, not the bank, was the owner of the notes and mortgage, the judgment properly disposed of the whole controversy by awarding the plaintiff a recovery, as against the bank, not only of the money paid into court, but also of the amount of the payments previously made to the bank. *Ibid.*

3. In such a case the trial court should, if necessary, direct the pleadings to be so amended as to sustain and justify the judgment; and if that court fails to do so the supreme court, on appeal from the judgment, will treat the pleading as having been properly amended. *Ibid.*

MUNICIPAL BONDS. See MUNICIPAL CORPORATIONS, 6–12.

MUNICIPAL CORPORATIONS.

Amendment of charter. See MUNICIPAL CORPORATIONS, 5.

Elections in villages. See VILLAGES.

Governmental powers and functions: Fixing ward boundaries: Validation by legislature.

1. Substantial equality in population is the primary object sought to be attained by ch. 436, Laws of 1901, giving to the common council in cities of the first class power periodically to "redistrict, readjust and change the boundaries of wards, so that they shall be as nearly equal in population as may be;" but *quære* whether the council may not lawfully consider the growth of population and make allowance for changes which that growth

is reasonably certain to produce within a very short period in the future. *State ex rel. Neacy v. Milwaukee,* 616

2. The question of the division of a city into wards is, in general, a legislative question. *Ibid.*

3. The legislature may by a subsequent statute cure defects or irregularities in municipal proceedings which it might have dispensed with or made immaterial by prior law, and such ratification or curative effect may result by implication as well as by direct legislative act. *Ibid.*

4. Thus, even if an ordinance passed in an attempted exercise of the power granted by ch. 436, Laws of 1901, was void when passed, because the wards were not "as nearly equal in population as may be," yet it was recognized and validated by the subsequent enactment of ch. 661, Laws of 1911, bounding assembly and senatorial districts by ward lines and expressly providing that the wards therein referred to should be the same as the wards fixed by said ordinance. *Ibid.*

5. The act of 1911 being a general law reapportioning the state into senate, assembly, and congressional districts, the mere fact that it incidentally has the effect above stated does not bring it within the prohibition of sec. 31, art. IV, Const., against amendment of city charters by "special or private" law. *Ibid.*

Police power: Licensing transient merchants, etc. See PEDDLERS.

Fiscal management: Issuance of bonds.

6. The statute (sec. 925—133, Stats. 1898) relating to the issuance of municipal bonds for public improvements must be liberally construed to effectuate the purpose intended. *Borner v. Prescott,* 197

7. An ordinance under that statute providing for the issuance of bonds "to defray the cost of constructing waterworks and connecting sewers" does not necessarily include a double purpose, but in support of the validity of the ordinance it should, if necessary, be presumed that but a single scheme was intended, requiring connecting sewers as part of it. *Ibid.*

8. The requirement of sec. 3, art. XI, Const., that no municipal bonds shall be issued until the municipality shall first "provide for the collection of a direct annual tax sufficient to pay the interest as it falls due, and also to pay the principal within twenty years," is satisfied by an ordinance levying *in præsenti* a tax of the requisite amount, specifying the sums to be raised each year, since the duty of collecting the tax in the usual way is thereby imposed upon the proper officers by force of law, and its performance may be compelled by *mandamus. Kyes v. St. Croix Co.* 108 Wis. 136, and *Bingham v. Milwaukee Co.* 127 Wis. 344, distinguished. *Ibid.*

9. The tax levied for any one year need not be for the precise amount payable that year, but it is enough that the sums as levied suffice to meet the principal and interest as they mature. *Ibid.*

10. The provision of the statute that "all such bonds shall be payable at the option of the city in annual instalments," means only that the city may, at its option, make the bonds payable all at one time or a part of them each year. *Ibid.*

11. The provision that the bonds "shall bear interest not exceeding six per cent. per annum payable semi-annually," does not require the interest to be paid semi-annually, but only that the amount to be paid shall not exceed semi-annual interest at the rate named. *Ibid.*

12. An ordinance provided for issuance of bonds to mature all at one time, but without amending it the city proposed to insert in the bonds a provision giving it an option to retire certain amounts at certain times before maturity. In an action by a taxpayer to restrain the issuance of the bonds the city answered that it had abandoned the purpose of departing from the ordinance, and at the time of the trial it intended to conform strictly to the terms thereof. Plaintiff having, however, persisted with the case upon the ground stated and upon other grounds which were untenable, it was proper to dismiss the action with costs, for the reason that it had been unnecessarily pursued to the prejudice of the city; but the judgment of dismissal, having inferentially passed upon and approved the option form of bonds, is modified on appeal so as to leave that question undetermined. *Ibid.*

MURDER. See HOMICIDE.

MUTUAL BENEFIT SOCIETIES. See INSURANCE, 10–12.

MUTUAL FIRE INSURANCE COMPANIES. See INSURANCE, 1–6.

NECESSARY PARTIES. See DRAINS, 5. PARTIES. SCHOOLS AND SCHOOL DISTRICTS, 8, 9.

NEGLIGENCE.

Acts and omissions constituting negligence. See BAILMENT. CARRIERS. DAMAGES, 1, 2. INSURANCE, 19, 20. JURY. MASTER AND SERVANT. PRINCIPAL AND AGENT, 1. RAILROADS. STATE TREASURER, 4. TRIAL, 3.

Gross negligence. See CARRIERS, 13.

1. In order to constitute gross negligence there must be either a wilful intent to injure, or that reckless and wanton disregard of the rights and safety of another or of his property, and that willingness to inflict injury, which the law deems equivalent to an intent to injure. The element of inadvertence must be wanting. *Willard v. Chicago & N. W. R. Co.* 234

Proximate cause of injury.

2. If the fact of reasonable anticipation of injury, as an element of proximate cause, is established as a matter of law, error in submitting the question to the jury is harmless if the jury answer it correctly. *Brossard v. Morgan Co.* 1

3. Where the facts are undisputed and no conflicting inferences therefrom can reasonably be drawn, the question of proximate cause becomes one of law. *Ibid.*

4. The jury having found in this case that defendant was negligent in furnishing a defective drive-belt, the undisputed evidence is *held* to establish the further fact that such negligence was the proximate cause of the injury to plaintiff, who, when the belt broke, was struck thereby and lost an eye. *Ibid.*

5. Technically, findings by the jury that defendant negligently failed to equip the machine with a reasonably safe drive-belt or with

a suitable drive-belt shifting device, and negligently failed to warn plaintiff of the danger to which he was exposed while working at the machine equipped as it was, included a finding that defendant had reasonable ground to anticipate an injury to some one by reason of the defects. *Ibid.*

6. The fact that a log fell from a loaded car and injured plaintiff some time after the loading was completed, when the car was being moved down the track, and in the absence of the loader, does not show that the incompetency of the loader was not the proximate cause of such injury. *Freeman v. Dells Paper & Pulp Co.* 93

Contributory negligence. See APPEAL, 13. MASTER AND SERVANT, 4. RAILROADS, 2, 3.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES. CORPORATIONS, 5. TRIAL, 4.

NEW TRIAL.

See JURY, 2.

1. The right of the trial court to entertain a motion for a new trial, after the term, based upon misconduct of the jury, rests upon sec. 2832, Stats. (1898), and in the present case its discretion in that regard does not appear to have been abused. *Ketchum v. Chicago, St. P., M. & O. R. Co.* 211

2. Upon a motion under sec. 2832, Stats. (1898), an affidavit of advice of counsel is not required. *Ibid.*

OFFER. See CORPORATIONS, 2–4.

OFFICERS.

Public officers. See DRAINS, 3. STATE TREASURER.

Election. See VILLAGES, 2.

Removal: Power, where vested.

[1. Whether, under our state constitution, the power to remove administrative officers may be vested in courts or judges, not determined.] *Clancy v. Fire and Police Commissioners,* 630

Same: Board of fire and police commissioners: Review.

2. Considering together the provisions of subsecs. 19, 20, and 21 of sec. 959—46*d*, Stats., it is plain that the legislative purpose was to require the board not only to decide whether the charges are sustained, but to make a decision which is reasonable under the evidence taken; and the review of its order by the circuit court is for the purpose of deciding, not whether the officer was in fact guilty or whether the court would decide the same way upon the evidence, but whether the board has performed its statutory duty of making a reasonable decision. *Ibid.*

3. Thus considered, the action for a review by the circuit court performs substantially the functions of the writ of *certiorari*, and the court therein neither removes an officer nor extends his term of office, but merely exercises the power of supervisory control over inferior tribunals which the constitution vests in the circuit courts. *Ibid.*

4. The provision in the last clause of subsec. 21 of said sec. 959—46*d*, Stats., that the court may require the board to make a

further return and also "to take further and additional testimony and make return thereof," does not authorize the court to decide the case on testimony which has never been considered by the board, but is to be construed as requiring the board to consider the new evidence taken and to return with it their decision in the light of such additional evidence. *Ibid.*

Authority and functions. See CORPORATIONS, 5–9. STATE TREASURER.

OFFICIAL BONDS. See STATE TREASURER, 1, 2.

OPINION EVIDENCE. See EVIDENCE, 5–7.

ORDINANCES. See MUNICIPAL CORPORATIONS, 7, 8, 12. PEDDLERS, 2, 5.

PAROL EVIDENCE. See ACCORD AND SATISFACTION. CONTRACTS, 2. GUARANTY, 1.

PARTIES.

See APPEAL, 10, 15–17. DRAINS, 5. SCHOOLS AND SCHOOL DISTRICTS, 8, 9. VENUE. WILLS, 5.

1. A motion to make the "estate" of a decedent a party to an action was properly denied where, at the time, there was no personal representative upon whom service could be made. *Mills v. Morris,* 277

2. A note and mortgage given by the purchasers of land for a part of the purchase price were transferred by the vendor prior to her death. After such death the purchasers brought suit against the transferee, alleging a defect in the vendor's title to the land, that the consideration for the note and mortgage had therefore failed, and that the transfer of the note and mortgage to defendant was a gift and without consideration; and praying that such securities be surrendered up and canceled. It was claimed by defendant and her husband that the securities were taken by her (with his consent) in settlement of an indebtedness of the decedent to them for care and nursing; that if the securities were canceled they would have a claim against decedent's estate for such services; and that the decedent before her death gave to her relatives considerable sums which it would be the duty of her administrator to collect and apply on such indebtedness. *Held,* that it was not necessary to bring in the administrator of the decedent as a party defendant, either for his protection or in order to a complete determination of the controversy. *Ibid.*

3. Although defendant's husband also claimed that he expected to receive some benefit from the securities assigned with his consent to his wife, yet, there being facts before the trial court from which it might conclude that the moneys due for services rendered to the decedent were the separate property of the wife, there was no error in denying a motion that the husband be made a party. *Ibid.*

4. A second and third motion to bring in an additional party may properly be denied where a final order has already been made denying the first motion, which the moving parties have made no attempt to vacate, modify, or set aside. *Ibid.*

PARTNERSHIP.

Firm assets: Real estate: Resulting trusts.

1. Real estate, not suitable for a particular partnership business nor intended to be or ever is used therein, does not become

assets of the firm in equity by mere verbal agreement of the owner, for a consideration, with his partners in such business that it shall be considered such. *Richtman v. Watson*, 385

2. The foregoing is because of sec. 2302, Stats. (1898). *Ibid.*

3. Real estate, purchased with partnership money, actually or constructively, for partnership purposes, belongs to the firm though the title be taken in the name of one partner with or without the consent of his associate. *Ibid.*

4. If a person purchase land with money of a partnership given him to buy land for the members to hold as tenants in common, taking title in his own name by previous consent, or subsequent acquiescence, the partners cannot claim it on a resulting trust. *Ibid.*

5. The rule above stated is because of the abrogation of resulting trusts. Sec. 2071, Stats. (1898). *Ibid.*

PART PERFORMANCE. See FRAUDS, STATUTE OF, 2, 3.

PASSENGERS. See RAILROADS, 1.

PEDDLERS.

1. The purpose of ch. 490, Laws of 1905 (secs. 1570–1584*j*, Stats.: Supp. 1906), was to regulate and tax, not to prohibit or destroy, the occupations (of peddlers, transient merchants, etc.) to which the act relates; and hence the delegation of power to municipalities to exact *per diem* fees (in addition to the license fee paid to the state) did not include the power to prohibit or destroy such occupations. *Monroe v. Endelman*, 621

2. The provision in sec. 5 of said act (sec. 1574, Stats.: Supp. 1906) that a transient merchant "shall . . . also pay to the treasurer of any city or village where he may be conducting his business a sum not to exceed $25 per day, . . . such amount to be determined by ordinance or resolution of such city or village," is a limitation upon the maximum amount that may be demanded, and not a delegation of authority to every city and village to impose the maximum amount. *Ibid.*

3. Such act delegates authority only to exact *reasonable per diem* fees, not exceeding the maximum stated, and in fixing such fees the size of the city or village in which the business is to be conducted, and perhaps the nature and extent of the business of the transient merchant, must be taken into consideration. *Ibid.*

4. The discretion vested in the municipal authorities, as to fixing the *per diem* fee, is controlling so long as it is exercised within the delegated limits and purposes; but it may be restrained within those legitimate boundaries by the courts. *Ibid.*

5. Where a transient merchant, having paid a license fee of $75 to the state, was offering at retail in a city of 4,500 inhabitants a stock of clothing worth not to exceed $3,000, and his sales averaged only $88, his gross profits about $18, and his expenses about $7 per day, an ordinance requiring him to pay to the city a *per diem* fee of $25 was confiscatory and void. *Ibid.*

PERFORMANCE. See CONTRACTS, 5–7. FRAUDS, STATUTE OF, 2, 3.

PERSONAL INJURIES. See DAMAGES, 1, 2. JURY. MASTER AND SERVANT. NEGLIGENCE, 4–6. PRINCIPAL AND AGENT, 1. RAILROADS. TRIAL, 3.

PHYSICIANS AND SURGEONS. See EVIDENCE, 1–3, 7. WITNESSES, 3, 4.

PLATS. See DEDICATION, 2.

PLEADING.
Necessary allegations. See INSURANCE, 18.
Complaint. See ACTION. APPEAL, 5. COUNTIES, 5, 6. GARNISHMENT, 4.
Answer. See GARNISHMENT, 1, 2. INSURANCE, 18.
Counterclaim. See GARNISHMENT, 2.
Demurrer. See APPEAL, 5. COUNTIES, 6.
Construction of pleadings. See COUNTIES, 5, 6. GARNISHMENT, 4.
Amendment of pleadings. See APPEAL, 5. MORTGAGES, 3.
Bill of particulars. See DAMAGES, 3.

PLEDGES. See ACTION.

POLICE POWER. See PEDDLERS.

POSSESSION. See ADVERSE POSSESSION. BILLS AND NOTES, 1. INSURANCE, 7. TAX TITLES, 3, 4.

PRESUMPTIONS. See CARRIERS, 8. COUNTIES, 4. DEDICATION, 3. DRAINS, 2, 3. TRUSTS AND TRUSTEES, 11.

PRIMA FACIE EVIDENCE. See CARRIERS, 1, 2. CORPORATIONS, 6. INSURANCE, 7.

PRINCIPAL AND AGENT.

The relation: Evidence.

1. Plaintiff was injured while working at certain logging operations which one M. had contracted to perform for defendant. The question being as to whether, pursuant to a clause in the contract with M., defendant had by its agent taken charge and control of such logging operations, so that plaintiff, when injured, was a servant of defendant and not of M., directions given by defendant's agent to the men in the logging camp, as to what they were to do and how the work should be conducted, were competent evidence, as being *acts* of the agent, not mere oral statements affecting the question of his agency. *Freeman v. Dells Paper & Pulp Co.* 93

Mutual rights, duties, and liabilities. See BONDS, 1.

Rights and liabilities as to third persons: Implied authority. See CARRIERS, 11, 12.

2. An agent has implied authority to do all those things which are reasonably necessary and proper to carry into effect the main powers conferred and which are not forbidden; and secret instructions cannot affect his apparent powers to the detriment of third persons who have dealt with him on the faith thereof. *Freeman v. Dells Paper & Pulp Co.* 93

Same: Unauthorized and wrongful acts.

3. Departure of the agent from the scope of his employment to effect a personal purpose, severs the connection between him, his principal, and the latter's employer, rendering him, alone, liable for his wrongful conduct to such employer's damage. *Firemen's Fund Ins. Co. v. Schreiber,* 42

4. If the agent, acting within the scope of his employment, performs the principal's duty in an unauthorized way to the damage of the latter's employer, such principal is liable therefor;

but, if a wrong be done by the agent outside the scope of his employment to the damage of such employer, though perpetrated within the period of such employment and through capacity acquired by reason of the employment, such principal is not liable. *Ibid.*

5. The doctrine respecting the liability of a railroad company for the conduct of its employees in the course of their employment, whether within the scope thereof or not, as in *Craker v. C. & N. W. R. Co.* 36 Wis. 657, does not rest on the principle of *respondeat superior;* it is a special liability grounded on absolute duty, and liability for the safety of passengers as regards negligent acts of such employees in the course of their employment, and does not apply to situations in general,—they are governed by the ordinary rule of *respondeat superior. Ibid.*

6. To render the wrong of the agent that of the principal,—*respondeat superior,*—the fact that it was done in the course or period of employment, is not sufficient; it must be in the prosecution of the principal's business, not by stepping aside therefrom to serve a personal end. *Ibid.*

7. The element of stepping aside, mentioned in the last foregoing, which is essential to break the *nexus* between the principal, the agent, and the employer of such principal, needs only change of mental attitude from that of serving the principal to that of serving a personal end; no particular interval of time is necessary. *Ibid.*

PRINCIPAL AND SURETY. See INSURANCE, 15–20.

PRIVILEGED COMMUNICATIONS. See WITNESSES, 3, 4.

PROFIT SHARING. See CORPORATIONS, 2–4.

PROMISSORY NOTES. See BILLS AND NOTES. CORPORATIONS, 5.

PROOFS OF LOSS. See INSURANCE, 6.

PROXIMATE CAUSE. See NEGLIGENCE, 2–6.

PUBLIC POLICY. See EXECUTORS AND ADMINISTRATORS, 4.

RAILROADS.

Operation: Delivery of freight. See CARRIERS.

Same: Injuries to passengers.

1. Where the door to the toilet room in a passenger car was constructed and operated as such doors usually are, and there was nothing obviously dangerous in such construction or operation, failure to provide a door check to prevent it from closing suddenly was not such negligence on the part of the railroad company as renders it liable for an injury to a passenger who, as he was about to close the door, lost his balance by reason of a sudden swaying of the car, thrust his hand against the jamb of the door to save himself from falling, and was injured by the sudden closing of the door upon his thumb, caused by the same swaying of the car. *Merton v. Mich. Cent. R. Co.* 540

Same: Injuries to person walking on track.

2. Where an employee in a mill yard, familiar with the whole situation and with the operation of engines on a railroad which served the mill, without any particular reason for so doing walked upon the railroad track in going from his work to his

boarding house, although other and perfectly safe routes were just as convenient, and neither when entering upon the track nor while walking thereon looked or listened for an approaching engine, he was, as a matter of law, guilty of contributory negligence precluding a recovery for an injury caused by his being struck by an engine. *Hanson v. Chippewa Valley & N. R. Co.* 104

3. A deaf mute who, while walking on a railroad track in the nighttime, was struck and injured by an engine coming from behind, which could have been seen while 800 feet away, is *held* upon the evidence to have been guilty of contributory negligence as a matter of law. *Tunnison v. Chicago, M. & St. P. R. Co.* 496

Same: Injuries to employee.

4. The words "a defect," as used in subd. 1, sec. 1816, Stats. (Laws of 1907, ch. 254),—relating to liability of a railroad company for "an injury caused by a defect in any locomotive, engine, car," etc.,—mean an existing unsafe and dangerous condition, the result of actionable negligence attributable to the railroad company under the conditions provided by the statute. *Ketchum v. Chicago, St. P., M. & O. R. Co.* 211

5. The amendment of subd. 1, sec. 1816, Stats. (1898), by ch. 254, Laws of 1907, by omitting therefrom the words "if such defect could have been discovered by such company by reasonable and proper care, tests, and inspection," etc., when considered in connection with the other changes made in the section and the text of the amending act as a whole, does not evince a legislative intent to impose an absolute liability upon railroad companies for all injuries sustained by employees by reason of defects in cars or other appliances specified; and such liability exists only where the injury is attributable to some negligence on the part of the company. *Ibid.*

6. To warrant the trial court in changing a jury's finding, supported negatively by the railroad company's inspection record and by evidence that no one had observed any displacement, that the door of a box car by which plaintiff was struck was in its normal position when the train left the last station prior to the accident, there should be an affirmative, uncontradicted showing that the door was then and there out of place. *Ibid.*

7. The jury having found as stated, and there being no evidence tending to show that the railroad company was negligent in failing to observe that the car door became displaced in going to the next station, a distance of fourteen miles, no legal liability of the company for an injury to a brakeman who was struck by the projecting edge of the door was shown. *Ibid.*

Same: Injury to employee of contractor.

8. In an action for injuries to a carpenter employed by a construction company in rebuilding a railway bridge or trestle, who was struck and injured by a construction train which, on a foggy morning, was backed in upon the trestle with unusual speed and without having given any signal or warning of its approach, the questions whether the railroad company was negligent in the running of such train and whether plaintiff, after having looked and listened for the train, which was expected, was negligent in attempting to pass from one end of the trestle

to the other on a board walk which had been laid between the rails for the use of the concrete workers, instead of going beneath the structure, are *held*, upon the evidence, to have been questions for the jury. *Collins v. Chicago & N. W. R. Co.* 305

9. Although the walk over the trestle was laid for use by the concrete workers, yet all the members of the construction crew having been invited to use it in all matters in which it would facilitate their work, if the railway company should have anticipated injury to any person by reason of the way in which it ran the train in question its responsibility is not affected by the fact that it was a carpenter, not a concrete worker, who was injured. *Ibid.*

10. Evidence relative to the usual mode of rebuilding bridges on a line of railway in operation, and to the mode of conducting the work at the time and place in question, was admissible in such case to aid in understanding questions of want of ordinary care. *Ibid.*

11. Under the circumstances stated, it was a question for each workman to determine in the exercise of ordinary care and prudence when to use the walk and to what extent and for what purposes connected with the construction work it should be used; and a requested instruction to the jury to the effect that plaintiff had no excuse for being on the trestle unless his presence there was absolutely necessary in the proper prosecution of the work in which he was engaged, was properly refused. *Ibid.*

RAPE.

In a prosecution for the rape of a girl eight years old, her testimony, corroborated by that of two children with whom she had been playing and by other evidence, together with proof of a former conviction of defendant for a similar offense, and his conflicting and contradictory testimony in an attempt to establish an *alibi*, *held* sufficient to establish the fact that he was the person who committed the crime. *Hardy v. State*, 176

REAL PROPERTY. See ACCOUNT. ACTION. ADVERSE POSSESSION. DEDICATION. DEEDS. INSURANCE, 7. MORTGAGES. PARTNERSHIP. TAXATION. TAX TITLES. TOWNS. TRUSTS AND TRUSTEES, 1. WATERS AND WATERCOURSES.

RECEIPTS. See ACCORD AND SATISFACTION.

RECORDING OF INSTRUMENTS. See DEDICATION, 2, 3.

REDEMPTION. See TAX TITLES, 5–13.

REMAINDERMAN. See TRUSTS AND TRUSTEES, 5–17.

REMARKS OF COUNSEL. See CRIMINAL LAW, 3. TRIAL, 2.

REMEDIES.

When exclusive. See CARRIERS, 3.

When the law creates a new remedy to meet a new situation, such remedy is exclusive and is subject to the conditions and limitations imposed by the legislature. *Clancy v. Fire and Police Commissioners*, 630

REMOVAL. See OFFICERS.

REPRESENTATIONS. See FRAUD. INSURANCE, 18.

REQUESTS FOR INSTRUCTIONS. See CONTRACTS, 6, 7. CRIMINAL LAW, 2. INSTRUCTIONS TO JURY, 1. RAILROADS, 11.

RESCISSION. See SALES, 2.

RES JUDICATA. See APPEAL, 12–14. JUDGMENT. PARTIES, 4.

RESULTING TRUSTS. See PARTNERSHIP, 4, 5. TRUSTS AND TRUSTEES, 1–4.

REWARDS.

See CORPORATIONS, 2–4.

1. As a general rule, a person making an offer of a reward may withdraw it before it is accepted; but he must be held to the exercise of good faith and cannot arbitrarily withdraw the offer for the purpose of defeating payment when to do so would result in a fraud upon those who in good faith have attempted to perform the service for which the reward was offered. *Zwolanek v. Baker Mfg. Co.* 517
2. Thus, in the case stated, discharge of an employee one day before he had earned the reward, where the sole purpose of such discharge was to prevent him from securing his share of the profits offered, would not take away his right to such share. *Ibid.*
3. The fact that an employee had been hired under a regular contract running for one year, subject to renewal, but terminable by either party on three months' notice, would not affect his right to the reward. *Ibid.*

RULES AND REGULATIONS. See CARRIERS, 4, 5.

RULES OF COURT.
Supreme Court Rule 10 (Cases and briefs), 532.

SALES.

Performance of contract: Acceptance: Rescission.

1. Where the vendee claims that goods sold by sample are inferior thereto, but has accepted the goods so that his remedy, if any, is limited to a reduction of the claim for the purchase price, the burden of proof is upon him, in an action for such price, to show the inferiority to sample. *Oscar Smith & Sons Co. v. Janesville Batting Mills,* 528
2. Where the vendee of cotton waste sold by sample retained the same for five weeks and, after using a portion of it, treated the whole, although unsuitable for his use, as his own by offering it for sale and endeavoring to have the vendor sell it for his account, there was such an acceptance of the goods as passed the title and precluded a rescission on the ground of inferiority to sample. *Ibid.*

Same: Place of delivery.

3. The question being whether railroad ties, sold under an oral contract and afterwards burned, had been delivered to the vendee, it being undisputed that the place of delivery was expressly provided for in the contract, although the parties differed as to what that place was, evidence as to a custom in respect to the place of delivery of such forest products was not

competent, and no instruction relative thereto should have been given to the jury. *Krueger v. Lake Trading Co.* 569

4. An instruction in such case that the jury might consider the custom of which the vendee had given evidence if they found it existed and was known to the vendor and *if there was no express agreement*, was not, in any event, harmful to the vendee. *Ibid.*

SCHOOLS AND SCHOOL DISTRICTS.

Joint school districts: Alteration: Review on certiorari: Laches.

1. A writ of *certiorari* to review the action taken at a joint meeting of two town boards and a village board to pass upon a petition for alteration of school district boundaries, was directed, among others, to the town clerks, to the village clerk who had acted as clerk of said joint meeting, and also to his successor in office. The former village clerk made return that he had kept a record of the meeting and had turned over all papers pertaining thereto to his successor. The successor made return of the records as within his official custody. *Held*, that the writ could not be quashed for misdirection. *State ex rel. Hebert v. Carlson*, 584

2. Unless the statutes (secs. 418, 419*a*, Stats.: Supp. 1906) relating to notice of the meeting to pass upon a proposed alteration of a school district are complied with there is no jurisdiction to make such alteration. *Ibid.*

3. Resident taxpayers in a school district, having children of school age, have such an interest in the matter as entitles them to invoke the remedy of *certiorari* to review a proceeding to alter such district. *Ibid.*

4. The fact that a writ of *certiorari* to review a proceeding to alter a school district was quashed for misdirection and because the relators did not show that they had an interest entitling them to sue out the writ, does not avail to show unnecessary delay or laches on the part of relators who promptly thereafter applied for a second writ. *Ibid.*

Dissolution: Liability for debts.

5. Where a municipal corporation incurs an obligation and is thereafter dissolved and merged in another municipal corporation by transfer of all its property to the latter, such property remains liable upon the obligation; and this rule applies to school districts. *Conway v. Joint School District*, 267

6. Sec. 424, Stats. (1898), which provides that in case of the dissolution of a school district the town board shall dispose of the property of the district, pay its debts, and distribute the balance of the proceeds as specified, does not furnish an exclusive remedy to a creditor of such school district; and if the town board fails to act and his debt is not paid he has a right to recover by action. *Ibid.*

7. Sec. 944, Stats. (1898), apparently relates to a case where territory is taken from one municipal corporation and attached to another without affecting the existence of the former; but at any rate it provides a mere mode of apportionment of property and indebtedness, and furnishes no remedy for the recovery of money, hence does not exclude the remedy by action. *Ibid.*

8. Where a school district borrowed money to aid in erecting a school house, issued a bond therefor payable in five years, with interest payable annually, and provided for its payment by levying a tax on the property of the district, to be annually collected, sufficient to pay the annual interest on said bond and the principal when due; and thereafter, before collection of the first tax levy, such district was dissolved and its territory divided among three other districts, an action was properly brought against said three districts to recover the amount due and to determine the proportion to be paid by each district. *Ibid.*

9. In such case each of the three districts is a necessary party to a complete determination of the questions involved. *Ibid.*

Borrowing money for school house: Limitation on tax.

10. Sec. 430, Stats. (1898), does not prohibit a school district from borrowing more than $600 for building or purchasing a school house, but the limitation is upon the amount of tax to be raised for such purpose in any one year. *Conway v. Joint School District,* 267

SIGNATURES. See FRAUDS, STATUTE OF, 1.

SLANDER. See LIBEL AND SLANDER.

SPECIAL LAW. See MUNICIPAL CORPORATIONS, 5.

SPECIAL VERDICT. See APPEAL, 13, 14. FRAUD. INSTRUCTIONS TO JURY, 2. TRIAL, 1, 5.

STATE TREASURER.

Duties as to securities deposited by trust company: Breach of official bond.

1. The duty of the state treasurer, under sec. 1791*e*, Stats. (Supp. 1906: Laws of 1905, ch. 504), to hold in trust the securities or cash deposited by a trust company, for the benefit of the depositors, creditors, and *cestuis que trustent* of such company, is an official duty whose faithful discharge is guaranteed by his official bond. *State ex rel. Sheldon v. Dahl,* 73

2. The duty in such case is one owing to individuals, and although the treasurer's bond runs to the state, yet where the attorney general has refused, on the ground that the state has no beneficial interest, to bring an action thereon to recover for breach of said duty, the action may be brought in the name of the state on the relation of the individuals who are beneficially interested. *Ibid.*

3. The duty of the state treasurer, under said sec. 1791*e*, is to retain possession of the securities or cash mentioned "at all times *during the existence* of" the trust company; and up to the time such company ceases to exist the duty is absolute, leaving no room for the exercise of judgment or discretion. *Ibid.*

4. Although the absolute duty of the state treasurer to retain possession of the securities or cash deposited by a trust company ceases when, under sec. 1789, Stats., the dissolution of such company is complete, yet, after that time he is still charged with the duties of a trustee in relation thereto. [Whether after that time he would be protected in case of a negligent surrender of the securities, if he acted in good faith, is not determined.] *Ibid.*

STATUTE OF FRAUDS. See CORPORATIONS, 4. FRAUDS, STATUTE OF.
STATUTE OF LIMITATIONS. See TAX TITLES, 8.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. FOOD. TAXATION.

Statutes changing procedure: Application to pending cases.

1. A statute merely changing the procedure and not affecting any substantial or vested right—in this case sec. 2649*a*, Stats. (Laws of 1911, ch. 354), providing in effect that upon a general demurrer a complaint shall be sufficient if the facts stated entitle plaintiff to any relief, whether legal or equitable—may be applied to a case in the appellate court, though enacted after the decision in the trial court. *State ex rel. Sheldon v. Dahl,* 73

Construction. See APPEAL, 2, 8, 11, 22, 23. CORPORATIONS, 10, 11. DEDICATION, 2. DRAINS, 1. EVIDENCE, 7. EXECUTORS AND ADMINISTRATORS, 2. GARNISHMENT, 2, 5. HOMICIDE, 2. JURY, 2. MORTGAGES, 1. MUNICIPAL CORPORATIONS, 1, 4–6, 10, 11. NEW TRIAL. OFFICERS, 2, 4. PEDDLERS, 1, 2. RAILROADS, 4, 5. SCHOOLS AND SCHOOL DISTRICTS, 2, 6, 7, 10. STATE TREASURER, 1. STATUTES. TAXATION, 5, 6. TAX TITLES, 2, 3, 7, 11, 13. VENUE. VILLAGES. WATERS AND WATERCOURSES, 2, 3.

2. The different parts of a statute should be so construed as to harmonize with its dominant purpose, unless unequivocal words compel a different construction. *Clancy v. Fire and Police Commissioners,* 630

3. Conflicts between different statutes will not be held to exist if avoidable by reasonable construction. *State ex rel. McManman v. Thomas,* 190

4. Titles of acts may be resorted to in cases of doubtful construction. *Ibid.*

STREETS. See DEDICATION, 2.

SUPERINTENDING CONTROL. See APPEAL, 10. OFFICERS, 3.

SUPREME COURT. See APPEAL AND ERROR.

SURETY COMPANIES. See INSURANCE, 15–20.

TAXATION.

Nature and extent of power. See SCHOOLS AND SCHOOL DISTRICTS, 10.

Liability of persons and property: Exemptions: Uniformity.

1. Unless restrained by constitutional provisions, the state legislature has full power to exempt any person or corporation or class of property from taxation according to its views of public policy or expediency. *Lawrence University v. Outagamie County,* 244

2. Under sec. 1, art. VIII, Const., providing "that the rule of taxation shall be uniform," statutory exemption from taxation must be based upon a legal classification. *Ibid.*

3. The rule of uniformity does not relate alone to the rate or percentage of taxation; and it may be as effectively abrogated by

arbitrary exemption from taxation as by arbitrary impositions of unequal amount. *Ibid.*

4. The rule of uniformity is violated by a statute giving an arbitrary exemption greater than is given to other persons of the same class owning property of the same general description. *Ibid.*

5. The legislature having, by sec. 1038, Stats., created a class consisting of chartered colleges or universities and prescribed exemptions for that class, a subsequent statute (Laws of 1901, ch. 116) giving to one member of that class by name an additional exemption based on no distinctive feature of the person receiving it or the property exempted, was invalid. *Ibid.*

6. The rule of practical construction—that the uninterrupted practice of the government prevailing through a long series of years and the acquiescence of all its departments settle a constitutional interpretation in accordance with such long continued practice—has no application where there has been no such acquiescence on the part of the judicial department, nor where in the application of the constitutional provision in question there can be no doubt, ambiguity, or uncertainty. *Ibid.*

TAX TITLES.

Change of county boundaries: Who to execute tax deeds on lands detached.

1. In a statute which takes territory from one county and attaches it to another, a provision that all tax certificates held by the former county on lands attached to the latter shall be assigned to the latter, and that the officers of the latter county shall execute tax deeds upon the certificate so assigned, does not apply to tax certificates held by private parties at the time of the change in boundaries. *Field v. Pier,* 83

2. Under sec. 1176, Stats. (1898), the county clerk of the county where the land is sold for taxes is authorized to execute the tax deed, in the absence of any legislative provision to the contrary, even though the land be set off into another county before the tax deed is due. *Ibid.*

Limitation: Constructive possession.

3. In order that the constructive possession of a tax-title claimant, growing out of the recording of the tax deed, may ripen into an absolute title under the statute (sec. 1187, Stats. 1898), it is necessary that the land remain vacant and unoccupied during the entire statutory period; and the planting and harvesting of two crops upon a small clearing on a farm of 120 acres, accompanied by the annual payment of taxes by the occupant, is sufficient to arrest the running of the statute. *Land & Loan Co. v. Kesler,* 283

4. Although such acts of occupancy are confined to one forty, their effect is not necessarily limited to that forty, but where such forty constitutes part of a known farm, as where three contiguous forties were entered as a homestead and, according to the course and custom of the country, a clearing was made on one forty and the building erected thereon, adverse possession

of the part actually occupied will extend by construction to the remainder of the farm. *Ibid.*

Redemption.

5. Where a county clerk accepts and retains a check offered in redemption of land from a tax sale, without objection to the form of payment, and the check is admittedly good though not cashed by the clerk, it is a good redemption. A tender of money is waived by the acceptance and retention of the check under such circumstances. *Field v. Pier,* 83

6. A tax lien which has ripened into a tax deed is not subject to redemption. *Washburn Land Co. v. Sanborn,* 562

7. Pending an action under sec. 1197, Stats. (1898), by grantees in a tax deed to bar the former owners, one to whom the defendants had deeded the land paid to plaintiffs' attorney a sum of money to cover the taxes, interest, charges, and costs of suit, for the purpose of wiping out the tax lien and upon the understanding that said attorney would try to procure from plaintiffs a quitclaim deed to the payor. Plaintiffs refused to give the quitclaim deed, and did not accept the payment. Thereafter the money was treated as equivalent to a deposit in court pursuant to sec. 1200, Stats. (1898). Final judgment went in favor of plaintiffs. *Held,* that the payor had received no consideration for the money so paid to plaintiffs' attorney, and might recover it back. *Ibid.*

8. The money so paid to plaintiffs' attorney having been held as a deposit for a specific purpose during the pendency of the action, the relation of debtor and creditor did not then exist between said attorney and the payor, and the time within which an action might be brought to recover the money did not begin to run until its repayment was thereafter demanded. *Ibid.*

9. A champertous agreement under which the former owners of the land had transferred it to the payor of the money in question did not affect the agreement under which the money was paid or preclude its recovery. *Ibid.*

Same: By minor.

10. A minor whose lands have been sold for taxes may redeem the same, within one year after reaching majority, in favor of a grantee to whom he has conveyed them. *Field v. Pier,* 83

Same: Constructive redemption.

11. Sec. 1165, Stats. (1898), relating to redemption of land sold for taxes, should be liberally construed. *Menasha Wooden Ware Co. v. Thayer,* 611

12. Although the owner of land knew that the taxes thereon for a previous year had not been paid, and had been informed by the county clerk of the amount required to redeem, yet when thereafter, within the time for redemption, his agent, to whom he had given sufficient money for the purpose, offered to redeem and was informed by the county clerk that there were no delinquent taxes, and by reason of such misinformation they were not paid, there was a constructive redemption by such owner. *Ibid.*

[13. Whether a prospective purchaser of land under an oral agreement pursuant to which a deed had been deposited in escrow and he was to accept such deed and pay the consideration if on

examination he found the title good, was within the term "other person" in sec. 1165, Stats. (1898), and had a sufficient interest in the land to entitle him to redeem from a tax sale, doubted.] *Ibid.*

TENDER. See TAX TITLES, 5.

TOWNS.

Town boards: Necessity of meeting for valid action: Permit to construct ditch across highway.

1. Where an act, such as the granting of a permit, must be done by a board, the action must be taken at a meeting at which all members of the board are present or of which all have had proper notice. *Lawler v. Brennan,* 115
2. Thus, a written permit, purporting to grant to a landowner the right to construct a ditch or channel across a highway for the purpose of connecting his lands east of the highway with a lake lying to the west thereof, is of no validity where no such action was taken at a meeting of the town board, although such permit was signed individually at different times and places, by all members of the board. *Ibid.*
3. Upon the evidence in this case, stated in the opinion, including records, subsequent surveys, and testimony as to practical location, it is *held* that the highway upon which plaintiff's lands abut on the east extends to a lake on the west, and that he owns no land on the west side thereof and hence has neither a common-law nor a statutory right to construct a tunnel or channel under or across the highway. *Ibid.*

TRANSIENT MERCHANTS. See PEDDLERS.

TRIAL.

Course and conduct of trial: Remarks of trial judge.

1. A remark by the trial judge that he deemed valid a statute which defendant claimed to be unconstitutional, was not prejudicial to defendant, where no testimony was ruled out because of the statute but the case was tried and a special verdict framed as if the statute did not exist, and under the verdict, irrespective of the statute, plaintiff was entitled to recover. *Haueter v. Marty,* 490

Same: Conduct of counsel. See CRIMINAL LAW, 3.

2. Unfair attempts of counsel to get before the jury improper testimony, leading to the discussion of irrelevant matters, is not ground for reversal on appeal where, from the rulings of the trial court and the instructions given, it appears that no prejudicial error resulted. *Rattlesnake D. Dist. v. Koshkonong Mud Creek D. Dist.* 223

Reception of evidence. See APPEAL, 6. CRIMINAL LAW. EVIDENCE. GUARANTY, 1. LIBEL AND SLANDER. RAILROADS, 10. WILLS, 8. WITNESSES, 2.

3. In an action for personal injuries caused by the breaking of a drive-belt, evidence that the belt had broken on previous occasions and that persons had been injured thereby was competent, the former to show the belt defective, the latter to charge

the master with knowledge of the danger therefrom. *Brossard v. Morgan Co.* 1

4. Where the fact that a check had been sent to plaintiff and returned by him as insufficient was conceded, the exclusion of the check itself when offered in evidence was not error, the mere form of the check being immaterial. *Haueter v. Marty,* 490

Questions for jury. See CARRIERS, 13. DAMAGES, 2. RAILROADS, 8.

Instructions to jury. See CONTRACTS, 6, 7. CRIMINAL LAW, 2, 3. HOMICIDE, 1. INSTRUCTIONS TO JURY. INSURANCE, 9. RAILROADS, 11. SALES, 3, 4.

Same: Requests for instructions. See CONTRACTS, 6, 7. INSTRUCTIONS TO JURY, 1. RAILROADS, 11.

Special verdict. See APPEAL, 13, 14. FRAUD. INSTRUCTIONS TO JURY, 2. TRIAL, 1.

5. Where the trial court has submitted in a special verdict a question which, upon the undisputed evidence, can properly be answered in but one way, it should change a contrary finding by the jury. *Hanson v. Chippewa Valley & N. R. Co.* 104

Findings: Right of court to make findings in jury trial. See APPEAL, 11.

6. By moving for judgment upon the verdict and the undisputed evidence a party does not submit his whole case to the court so as to give the court the right to make findings upon material controverted issues upon which the jury failed to agree or which the court had refused to submit to the jury. *Schauer v. Bodenheimer,* 550

TRUST COMPANIES. See CORPORATIONS, 11. STATE TREASURER, 1, 3.

TRUSTS AND TRUSTEES.

Charitable trusts: Resulting and implied trusts. See PARTNERSHIP, 4, 5.

1. If a person deposit money with another to buy land for such person or to hold upon a charitable trust for a class, and such other invests the money, taking title in form as owner, involving a breach of good faith, an implied trust is created in favor of such person or such class according to the facts. *Richtman v. Watson,* 385

2. In the circumstances last stated, if the purpose of the deposit is for the depositee to invest the money in property to be held for a class, and a breach of faith committed by not having the deed show the facts be waived by the depositor, that does not affect the title; as to him, in case of the breach being against the depositor it changes the implied trust into the common-law field of resulting trusts, leaving the depositor no remedy but to recover back the money, because there is no implied trust, strictly so called, without breach of faith and no enforceable resulting trust. *Ibid.*

3. The rule as to trusts requiring definiteness of scheme and of beneficiaries who can enforce it, does not apply to charitable trusts. *Ibid.*

4. In case of a trust for charity, individual beneficiaries may be uncertain and the particular object vague, the latter may be

single or broad, only stopping something short of general charity. So the class may be great or small and there may be vagueness in many respects without jeopardizing the trust. *Ibid.*

Construction and operation. See CORPORATIONS, 11. STATE TREASURER.

Management and disposal of trust property: Income and corpus of estate distinguished: Rights of life tenant and remainderman.

5. Where a will provides for the payment of certain specific annuities during the period of settlement of the estate, but makes no disposition of the balance of the income, such balance should be added to the *corpus* of the estate. *Miller v. Payne,* 354

6. Part of an estate consisting of bank stock, and the executor during the period of administration having paid a large assessment thereon to make up a defalcation by the president of the bank, such payment was properly chargeable to the *corpus* and not to income or, in other words, to the life tenant. It was not, therefore, necessary to reimburse the estate the amount of such payment out of earnings before dividends on the stock could be paid to the life tenant. *Ibid.*

7. During the existence of a testamentary trust a fifty per cent. dividend was declared on stock of a realty company which had been formed by the testator and others to assist a bank in which he was interested by taking over a tract of land which the bank had acquired, the purpose of the incorporators being to improve the property, hold it until it could be disposed of to advantage, and then sell it and divide the proceeds. The dividend was declared and paid out of the proceeds of the sale of part of such real estate and was the only dividend the company had ever paid. *Held,* that such dividend was a part of the *corpus* of the trust estate, and the life tenant was not entitled thereto. *Ibid.*

8. Had the corporation which declared such dividend been engaged in trading in real estate, the profit accruing to it from an enhancement in value of the real estate, as well as from rents and profits, would be income, but the corporation in question was not such trading corporation. *Ibid.*

9. The fact that such corporation may have had on hand a surplus of rents and profits from which a dividend might be declared, does not affect the question as to the character of the dividend actually declared from the proceeds of sales. *Ibid.*

10. The fact that a dividend declared on bank stock held in trust was charged against a fund designated as undivided profits is not conclusive, as between the life tenant and the remainderman, on the question whether it was a dividend or a part of the *corpus.* *Ibid.*

11. The presumption is that a dividend declared on corporate stock is declared out of income, and as between the life tenant and remainderman the burden rests upon the latter to prove it was not. *Ibid.*

12. Where all the stockholders in a bank in which testator held stock, including the trustees under his will acting with the consent of the beneficiaries, appropriated a dividend on such

bank stock, earned and declared after testator's death, to the purchase of a trust company which became an ancillary institution to the bank, the stock of such trust company must be regarded as income and belongs to the life tenant and not to the remainderman. *Ibid.*

13. In a controversy between life tenant and remainderman as to what is "income" from corporate stock, recoveries made on assets previously charged to profit and loss account belong to the *corpus*. *Ibid.*

14. Where new bank stock was issued and sold at 170 per cent., and of the premium 53.5 per cent. went to make the book value of the new stock equal the old, the remainder of such premium represented a net profit to be distributed ratably between old and new stock. *Ibid.*

15. Profits realized by a bank from the sale of land purchased from a bankrupt estate are not to be regarded as an enhancement of the capital of the bank, but as ordinary profits, and as such belong to the life tenant. *Ibid.*

16. A dividend substantially earned at the time of the purchase of bank stock by a testamentary trustee, and declared shortly thereafter, belongs to the principal of the trust estate and not to income. *Ibid.*

Accounting: Expenses of trustee. See EXECUTORS AND ADMINISTRATORS, 9–14.

17. Where a *bona fide* controversy existed between the life tenant and remainderman under a testamentary trust, as to what constituted income and what belonged to the *corpus* of the trust estate, the value of services performed by the trustee in preparing data necessary to the judicial determination of that question was properly charged equally to both parties. *Miller v. Payne*, 354

Termination of trust by interested parties.

18. In general, all interested in trust property, if *sui juris*, may, by agreement, terminate the trust. *Will of Rice: Cowie v. Strohmeyer*, 401

19. The rule last stated does not apply where any of the parties are under disability, or where the settler made known, expressly or plainly, his intention that such power should not exist. *Ibid.*

UNGUARDED MACHINERY. See MASTER AND SERVANT, 4, 6, 7.

UNIFORMITY. See TAXATION, 2–5.

USAGE AND CUSTOM. See SALES, 3, 4.

VENUE.

Change of venue: By whom made: Who constitute "one party."

Excluding merely nominal parties, all who have appeared in an action and are interested on the same side, though not necessarily on the same side of the record, constitute one party as to making application for a change of venue, and must join to satisfy sec. 2625, Stats. (Supp. 1906: Laws of 1905, ch. 282). *Will of Rice: Cowie v. Strohmeyer*, 401

VERDICT. See MASTER AND SERVANT, 6. TRIAL, 5.

VESTED RIGHTS. See STATUTES, 1. WILLS, 13, 14.

VILLAGES.

Election of trustees.

1. Ch. 329, Laws of 1901, entitled "An act to amend village charters, and providing for the election of trustees," applies only to villages incorporated under special charters, not to those incorporated under the general charter law. *State ex rel. McManman v. Thomas,* 190
2. Although, under ch. 11, Laws of 1911, the trustees elected in that year in a village incorporated under the general law should have been divided into two classes as therein provided, failure to so divide them was a mere irregularity not invalidating the election, and all trustees then elected were entitled to hold office for at least one year. *Ibid.*

WAIVER.

See INSURANCE, 5, 6, 12. TAX TITLES, 5. TRUSTS AND TRUSTEES, 2.

1. Waiver does not require any consideration, lost or gained, to support it, but does require capacity on the part of the alleged waivor to give away his rights. *Will of Rice: Cowie v. Strohmeyer,* 401
2. In the absence of bad faith, neither the doctrine of estoppel nor that of waiver applies to minors. *Ibid.*

WARD BOUNDARIES. See MUNICIPAL CORPORATIONS, 1–4.

WARNING SERVANT. See MASTER AND SERVANT, 7. NEGLIGENCE, 5. RAILROADS, 8.

WATERS AND WATERCOURSES.

Dams: Flowage of land.

1. Under a contract made in 1906 defendant had the right to overflow, by means of a dam thereafter to be erected, any part of a certain tract of land owned by plaintiff, for a compensation to plaintiff of $25 per acre. Pursuant to such contract it was in 1907, before the dam was constructed, by mutual agreement and arbitration determined that 1.2 acres would be overflowed and, in consideration of $30 paid by defendant, plaintiff acknowledged satisfaction and discharge of any damages that might thereafter be caused "by such flowage," and defendant released "the balance of the land" from the contract of 1906. In arriving at such amount of overflow it was assumed that the dam would have a head of nineteen feet, but it was afterwards constructed with a head of twenty feet, and a large area of the land in excess of 1.2 acres was flooded thereby. *Held,* that the words "such flowage" in the agreement of 1907 meant the flowage of 1.2 acres; that by the release in that agreement defendant had given up all right under the contract of 1906 to overflow the "balance of the land," meaning the remainder thereof after subtracting the 1.2 acres; and that therefore there was no consent by plaintiff to the flooding of such remainder. *Brasch v. Rothschild Water Power Co.* 594
2. Neither the general milldam law (ch. 146, Stats. 1898) nor sec. 1852, Stats. (1898), governs the case. *Ibid.*
3. The defendant being the assignee of the persons authorized by ch. 155, Laws of 1903, to build the dam, and holding its power

of eminent domain under that statute, to be exercised as provided in secs. 1777*a*–1777*d*, Stats. (1898), the plaintiff had the right to maintain an action for the flowing of the remainder of his land, unless such action should be stayed upon defendant's application under sec. 1777*d*. *Ibid.*

4. Plaintiff was not bound in such action to show what damage was caused by a dam at a twenty-foot head over and above the damage caused by a nineteen-foot head, but was entitled to recover for all damage to the remainder of his land, excluding the 1.2 acres. *Ibid.*

Location of highway on lake shore: Right to construct channel. See TOWNS, 2, 3.

WILLS.

Nature and extent of testamentary powers: Right to make will and have it carried out: Substitution of different scheme by interested parties. See INSURANCE, 13, 14.

1. The abstract question in any particular case as to whether the property of a deceased person shall be distributed according to the wishes of the parties interested, or claiming to be so, instead of according to the written law or the will, is not of judicial cognizance. *Will of Rice: Cowie v. Strohmeyer,* 401

2. The right to make a will is more sacred than that to make a contract; the former being beyond judicial power to disturb on equitable grounds while the latter is not. *Ibid.*

3. The right to make a will was recognized as one of first importance when the constitution of Wisconsin was adopted and enjoyment thereof was guaranteed thereby. *Ibid.*

4. Inherent in the right to make a will there is a constitutional right to have one which is validly executed carried out according to the intent of the testator. *Ibid.*

Probate: Proceedings in rem.

5. Proceedings to obtain admission of a will to probate constitute an action *in rem* to establish status to which the public is a party; but without capacity to substitute any scheme of distribution for that of the testator. *Will of Rice: Cowie v. Strohmeyer,* 401

6. Upon the person designated according to law to propose a will for probate performing his duty, judicial doors open for that particular purpose only of passing upon such proposition. *Ibid.*

7. A will in possession of the proper county court for determination of its admissibility to probate, being a subject of an action *in rem* in such court, the thing is provable or disprovable according to law and as regards whether it is what it purports to be; if proponent and persons interested drop out the subject of the action remains to be dealt with, the court's sole function being to determine legality of execution and genuineness of testamentary declaration. *Ibid.*

Same: Questions involved.

8. In a will contest, only evidence bearing on legality of execution, testamentary capacity, and whether the instrument purporting to be the particular person's will is such in fact, is legitimate. *Will of Rice: Cowie v. Strohmeyer,* 401

9. A will contest cannot, properly, be turned into an action for construction, reformation, or rescission, since the sole question is whether the paper purporting to be the will of the testator represents his legally declared final wishes as to the *post-mortem* disposition of his estate. *Ibid.*

10. On appeal from an order admitting a will to probate, the scope of judicial power is limited by the nature of the proceeding and the rights involved. *Ibid.*

Change in testator's scheme by persons interested: Power of court.

11. Parties interested in a testate estate are not competent to substitute their will for that of the testator so as to have the former carried out as if it were the scheme of the latter, and the court is powerless to give validity to any such scheme. *Ibid.*

Construction. See TRUSTS AND TRUSTEES, 5.

Same: Legacies. See INSURANCE, 13, 14.

12. A will (1) provided that testator's debts be paid; (2) gave $1,000 to his daughter or, if she predeceased him, to her children; (3) directed the sale of all testator's real estate and personal property and that out of the proceeds thereof, after the payment of debts and expenses of administration, the executor "pay the legacies hereinafter named;" (4) directed the executor to pay specific sums to persons named, including children of the daughter named in the second paragraph; (5) provided: "In case the proceeds of my estate are not sufficient to pay all of said legacies in full, the shortage shall be borne by all in proportion to their respective legacies, and if said estate is more than sufficient to pay said legacies, said legatees shall share the same in proportion to their respective legacies." *Held*, that the fifth paragraph refers to all legacies given by the second and fourth paragraphs, not merely to those given by the fourth paragraph. *Will of Derrickson: Dow v. Hamilton*, 26

Same: Estates, when vest.

13. Where a will devises the residue of the estate to trustees to hold for a certain term and pay over the income as specified to the widow and sister of the testator, then to make a partial distribution of the *corpus*, one half to the widow and one fourth to the sister, and to retain the remaining one fourth during the lifetime of the widow, paying the income to her, and at her death to assign the principal to the sister if she should survive the widow, otherwise to the sister's son, it is *held*, in the absence of any language in the will evidencing an intention to postpone or delay the vesting of the estate in such *cestuis que trustent*, that it must be regarded as vesting at the time of the death of the testator. *Miller v. Payne*, 354

14. In such case, the element of time was not annexed to the devise itself, as a condition precedent thereto, but merely to the time of assignment thereof. *Ibid.*

WITNESSES.

Competency: Husband and wife.

1. Where a wife shipped goods consigned to her husband and testified that he was the owner, and no issue of ownership was raised by the answer, a finding of ownership in the husband

was sustained by sufficient evidence. *Tradewell v. Chicago & N. W. R. Co.* 259

2. Proof that plaintiff's wife was in possession of goods consisting in part of articles of clothing made by her from materials purchased as his agent, and all owned by him, which goods she delivered to a carrier in another state consigned to plaintiff in Wisconsin, shows her agency sufficiently to sustain the admission of her testimony both as to the circumstances of the shipment and as to the value of the goods. *Ibid.*

Same: Privileged communications: Physicians and surgeons. See EVIDENCE, 5–7.

3. Whether sec. 4075, Stats. (Laws of 1911, ch. 322 and ch. 664, sec. 44), is applicable to criminal cases, not determined. *State v. Law,* 313

4. Sec. 4078*d*, Stats. (Laws of 1905, ch. 149),—providing that "no person shall be excused or privileged from testifying fully under oath in any prosecution brought under" secs. 4352 or 4583, Stats. (1898), and providing for immunity of the witness from prosecution for any transaction so testified to,—takes away, in the cases specified, not only the privilege against self-incrimination, but also the professional privilege of a physician accorded by sec. 4075, Stats. *Ibid.*

Cross-examination.

5. A party asking a witness an immaterial question on cross-examination is bound by the answer given, and it is error to permit the witness to be impeached relative thereto. *Freeman v. Dells Paper & Pulp Co.* 93

6. This rule applies where a witness is asked on cross-examination if he had not stated on a former occasion that another witness (who had not been interrogated in regard to the matter) had made overtures to him suggesting an attempt at subornation of perjury, and denies making any such statement. *Ibid.*

7. In such case evidence offered ostensibly to impeach the witness so interrogated was in effect an impeachment of the other witness involved, and where the latter was an important witness for the party calling him, and especially where the court refused to permit him to give his version of the matter, its admission was prejudical error. *Ibid.*

Impeachment. See WITNESSES, 5–7.

WORDS AND PHRASES.

Annual instalments, in statute. See MUNICIPAL CORPORATIONS, 10.
At least, in bill of particulars. See DAMAGES, 3.
Balance of the land, in contract. See WATERS AND WATERCOURSES, 1.
Benefit, in by-law. See INSURANCE, 3.
Charters of villages, in statute. See VILLAGES, 1.
Corpus of estate. See TRUSTS AND TRUSTEES, 5–16.
Damages, in statute. See GARNISHMENT, 5.
Defect, in statute. See RAILROADS, 4.
Existence of trust company, in statute. See STATE TREASURER, 3.
Heat of passion, in statute. See HOMICIDE, 2.
Income. See TRUSTS AND TRUSTEES, 5–16.
Interest not exceeding six per cent. payable semi-annually, in statute. See MUNICIPAL CORPORATIONS, 11.
Jurisdiction of the subject matter. See JUDGMENT, 4.
Knowledge of the employer, in bond. See INSURANCE, 17.

Liable for, in contract. See CONTRACTS, 4.
No person, in statute. See WITNESSES, 4.
No. 2 common and better, in contract. See CONTRACTS, 6, 7. EVIDENCE, 5.
Other person, in statute. See TAX TITLES, 13.
Party, in statute. See VENUE.
Proceedings thereafter, in statute. See APPEAL, 23.
Proceedings upon appeal, in statute. See APPEAL, 23.
Such flowage, in contract. See WATERS AND WATERCOURSES, 1.
Take . . . additional testimony and make return thereof, in statute. See OFFICERS, 4.

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